

No. 11858

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United States  
Circuit Court of Appeals  
For the Ninth Circuit

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FRED HARVEY, a corporation,  
Appellant,

vs.

ELMER H. MATEAS,  
Appellee.

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Transcript of Record

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Upon Appeal from the District Court of the United States  
for the Southern District of California,  
Central Division

**FILED**

MAR 26 1948

**PAUL P. O'BRIEN, CLERK**



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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## NAMES AND ADDRESSES OF ATTORNEYS

For Appellant:

SHELL & DELAMER,  
1212 Bartlett Bldg.,  
215 W. Seventh St.,  
Los Angeles 14, Calif.

For Appellee:

WALTER GOULD LINCOLN,  
1113 Lincoln Bldg.,  
Los Angeles 14, Calif.

In the Superior Court of the State of California  
in and for the County of Los Angeles

No. 485,744

ELMER H. MATEAS,

Plaintiff,

vs.

FRED HARVEY, a corporation; Doe No. 1; Doe  
No. 2; Doe No. 3,

Defendant.

COMPLAINT FOR DAMAGES FOR  
PERSONAL INJURIES

Plaintiff complains of the defendant and alleges:

I.

That Fred Harvey, a corporation, is now and was at all times mentioned herein, a corporation doing business in the State of California.

II.

That on or about June 17th, 1942, the plaintiff rented from the defendant a certain mule reported to be named "Chiggers" for the purpose of riding said mule in a party accompanied by a guide furnished by the defendant; that the said mule was selected by the defendant for the plaintiff.

That plaintiff had no knowledge of any of the peculiarities of the mule and plaintiff was not accustomed to riding this said mule.

III.

That on the same day the Plaintiff did ride the said mule and the said mule did buck and



jump and throw the plaintiff off, and the plaintiff did strike the base of his spine upon the pavement and receive a fracture of the right transverse process of the 12 dorsal vertebra. [2\*]

IV.

That by reason of the same the Plaintiff did suffer continuous pain and discomfort at the small of his back and right hip. That such pain continues even to the present time.

V.

That by reason thereof he has been obliged to and has remained away from his work as a plastering contractor, and has been obliged to and has received hospitalization and the attention of physicians.

VI.

That by reason of the said injury to his spine and hip the plaintiff has been damaged in the sum of \$5,000.00, and has paid, or been obligated to pay to said physicians the sum of \$370.50; and has lost an additional sum of \$1785.00 by reason of his absence from his work.

VII.

That no part of any of said sums has been paid, and the whole thereof is now unpaid to the Plaintiff.

Wherefore, Plaintiff prays for judgment against the defendant in the sum of \$7155.00, and interests and costs.

WALTER GOULD LINCOLN.

Attorney for Plaintiff [3]

State of California,  
County of Los Angeles—ss.

Elmer H. Mateas being by me first duly sworn, deposes and says: that he is the plaintiff in the above entitled action; that he has read the foregoing complaint and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters which are therein stated upon his information or belief; and as to those matters that he believes it to be true.

ELMER H. MATEAS.

Subscribed and sworn to before me this 26th day of May, 1943.

[Seal]

G. M. PAULL,

Notary Public in and for the County of Los Angeles, State of California.

My commission expires June 22, 19....

[Endorsed]: Filed May 28, 1948, 9:54 a.m. [4]



[Title of Superior Court and Cause.]

PETITION FOR REMOVAL TO  
FEDERAL COURT

To the Honorable, the Superior Court of the State  
of California, in and for the County of Los  
Angeles:

The petition of Fred Harvey, a corporation, one  
of the defendants in the above entitled action, re-  
spectively shows as follows:

I.

That petitioning defendant is a corporation  
organized and existing under the laws of the State  
of New Jersey, and at the time of the commence-  
ment of this action and ever since has been and  
still is a resident of and citizen of the State of  
New Jersey.

II.

That said cause is a civil action, to-wit, an action  
for damages on account of personal injuries alleged  
to have been sustained by the plaintiff, Elmer H.  
Mateas, as a result of being thrown from a mule  
rented to him by your petitioner. [6]

III.

That the controversy involved in this action is  
between citizens of the United States residing in  
different states of the United States, to-wit, be-  
tween the plaintiff, Elmer H. Mateas, who resides  
in and is a citizen of the State of California, on  
the one hand, and the defendant, Fred Harvey,  
a corporation, who is a citizen of the State of New  
Jersey on the other hand.

## IV.

That the matter in dispute in this action exceeds in value the sum of \$3,000.00 exclusive of costs, as appears from the allegations of the complaint filed herein, which allegations are incorporated herein by reference with the same force and effect as if fully re-alleged and re-stated herein, for the purpose of showing the amount in controversy.

## V.

That your petitioning defendant, Fred Harvey, a corporation, desires to remove said cause before the trial thereof in to the District Court of the United States of America in and for the Southern District of California, Central Division.

## VI.

That this petitioning defendant, Fred Harvey, a corporation, hereby presents a good and sufficient bond as provided by the statutes in such cases, that said petitioning defendant will enter into such District Court of the United States, within thirty days from the filing of this petition, a certified copy of the record in this suit and conditioned for the payment of all costs which may be awarded in this action by the said Court if the said District Court holds that said action was wrongfully and improperly removed thereto.

## VII.

That this petitioning defendant was served with summons and complaint in the above entitled action in Los Angeles, County of Los Angeles, State of

California, on the 23rd day of August, 1943, [7] and that said petitioning defendant's time to plead to said summons and complaint has not expired as of the date hereof. That no appearance in said action has heretofore been made by this petitioning defendant.

### VIII.

That your petitioner was the owner of the mule referred to in plaintiff's complaint at the time of the renting thereof to the plaintiff and at the time of the happening of the accident referred to in plaintiff's complaint, and that no other person had any right, title or interest in or to said mule or rented the same to the plaintiff.

### IX.

That a separable controversy exists between the plaintiff and your petitioning defendant in connection with the alleged liability on the part of your petitioner as the result of the renting of said mule by your petitioner to the plaintiff.

### X.

That your petitioner is informed and believes and upon such information and belief alleges that the defendants other than this petitioning defendant named in said complaint, to-wit, Doe No. 1, Doe No. 2, and Doe No. 3, and each of them, are not necessary or proper parties to this action, and that said fictitiously named defendants, and each of them, have been fraudulently joined as defend-

ants in this action for the purpose of attempting to prevent a removal of this cause to said United States District Court, and that your petitioner is informed and believes and therefore alleges that no service of summons or complaint has been attempted or has been had upon such fictitiously named defendants, or any of them.

Wherefore, said petitioning defendant prays that said Superior Court proceed no further herein except to make the order of removal of said cause, as required by law, from said Superior Court to said United States District Court, and to accept and approve the said statutory bond in connection therewith, which is herewith presented [8] to said Superior Court, and to direct a transcript of the record herein to be made and certified by the Clerk of said Superior Court, as provided by law, and your petitioner will ever pray.

FRED HARVEY, a corporation,  
By SCHELL & DELAMER,  
By GERALD F. H. DELAMER,  
Its Attorneys,  
Petitioner.

SCHELL & DELAMER,  
By GERALD F. H. DELAMER,  
Attorney for Petitioning  
Defendant.



State of California,  
County of Los Angeles—ss.

Gerald F. H. Delamer, being by me first duly sworn, deposes and says: that he is one of the attorneys for the petitioning defendant in the above entitled action; that he has read the foregoing petition for removal to Federal Court and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters which are therein stated upon his information or belief, and as to those matters that he believes it to be true; that this verification is made on behalf of said petitioning defendant because said petitioner has no official within this County authorized to execute this verification, and that affiant is one of said petitioner's attorneys of record, and therefore makes this verification.

GERALD F. H. DELAMER.

Subscribed and sworn to before me this 1st day of September, 1943.

MILDRED HUFFINE,  
Notary Public in and for the County of Los Angeles, State of California. [9]

[Title of Superior Court and Cause.]

### ORDER FOR REMOVAL

This cause coming on for hearing upon petition and bond of Fred Harvey, a corporation, one of the defendants herein, for an order transferring this cause to the District Court of the United States for the Southern District of California, Central Division, and it appearing to the court that the said defendant has filed its petition for such removal in due form of law and that said defendant has filed its bond duly conditioned with good and sufficient sureties as provided by law, and that said defendant has given the plaintiff due and legal notice thereon, and it appearing to the court that this is a proper cause of removal to said District Court, said petition and bond are hereby accepted and approved and

It Is Hereby Ordered and Adjudged that this cause be and it is hereby removed to the United States District Court for the Southern District of California, Central Division, and that the Clerk is [12] hereby directed to make up and certify the record in said cause for transmission to said court forthwith.

Done in open court this 13th day of September, 1943.

/s/ ALFRED L. BARTLETT,  
Judge.

[Endorsed]: Filed Sept. 13, 1943. [13]

District Court of the United States for the Southern District of California, Central Division

No. 3179-Y Civ.

ELMER H. MATEAS,

Plaintiff,

vs.

FRED HARVEY, a corporation, et al.,

Defendants.

## SECOND AMENDED COMPLAINT

Leave of Court having been granted, Plaintiff hereby amends his complaint and alleges:

### I.

That the Fred Harvey, a corporation, is now and was at all times herein mentioned, a corporation organized and existing under the laws of the State of New Jersey, and doing business in the States of Arizona and California.

### II.

That the Grand Canyon of the Colorado is in the State of Arizona aforesaid, and at and on a portion of the south rim of the said Canyon, the said defendant corporation has now, and has maintained, operated and owned for at least five years last past and immediately prior to the beginning of this action, an all-year-round resort, known as El Tovar.

## III.

That the Colorado River runs in a general easterly and westerly direction at the base of the said south rim, which is about a mile above [15] the surface of the said river; that as one of the attractions and inducements to the excursionist to patronize the said El Tovar the said defendant corporation has owned, operated and maintained for the same period of time two trails leading from the said south rim to the said river, one known as the "Phantom Ranch Trail" and the other known as the "Bright Angel Trail."

That the said "Bright Angel Trail" follows the contour of the canyon, is about 8 miles in length, and very tortuous, dangerous and steep, with many sharp turns and narrow pathways, all of which conditions were well known to defendant corporation on June 17th, 1942, but unknown to the Plaintiff herein.

## IV.

That continuously since 1907 and particularly on June 17, 1942, and in connection with said El Tovar, said corporation did maintain and conduct excursion trips for the guests of said hotel and the general public, consisting of a ride on the back of a mule down the said canyon to the Colorado River and back, and on and along said "Bright Angel Trail."

## V.

As one of the inducements to persuade the general public, and particularly this plaintiff, to



undertake such trips the defendant corporation issued and distributed at the said hotel and elsewhere in 1941 and 1942, in large quantities, a printed illustrated circular, which, among other statements, contained the following:

“Trail Trips Into the Canyon

Although visitors may venture short distances down these trails on foot, the accepted mode of travel for longer journeys is by the famous Grand Canyon mules. These faithful, sure-footed animals, in charge of experienced guides, hold a 30 years' record of carrying many thousand of inexperienced riders down the trails and back in perfect safety.” [16]

Prior to June 17, 1942, the copies of the said circular containing said statement were given to the plaintiff by said defendant corporation, and said paragraph was read by plaintiff.

VI.

Plaintiff presented himself on June 16, 1942, to an employee of said defendant who sold tickets and made reservations for the said excursions, and particularly one such excursion to be taken on July 17, 1942, and plaintiff stated then and there that he had never ridden upon either horse or mule. Whereupon, and as a portion of the said inducement of said defendant corporation, the said employee (whose name is unknown to plaintiff) stated to plaintiff that most of the persons who had made similar trips were also inexperienced riders.

## VII.

Relying upon said inducements and believing the same, and particularly believing that said excursion could be taken by him in safety, and having no knowledge or means of knowledge to the contrary, the plaintiff purchased tickets for the said excursion on June 17, 1942, from defendant corporation, for himself and his wife, and paid to said defendant the fee required therefor.

## VIII.

On June 17, 1942, the plaintiff and his wife presented themselves upon the premises of defendant corporation, and each climbed upon the back of a mule as selected by the employee of said defendant, the mule to which plaintiff was assigned being named "Chiggers," and being the last of a string of seven similar animals, each carrying an excursionist.

Said mule "Chiggers" had spent the preceding winter months in pasture, and this trip was the first time *had* had been either up or down any trail since said winter, none of which facts were known to plaintiff.

## IX.

At said time and place the plaintiff was instructed by the trail master, John Bradley, an employee of defendant corporation, to hold the reins in his hands at all times, and plaintiff did so, not knowing what effect such act on his part might have upon the said mule, altho the other riders in

plaintiff's group aforesaid let their respective reins lie loose upon the neck of their respective [17] mules.

That said string of mules was preceded by the guide, named Bob Ennis, an employee of defendant corporation.

#### X.

On the ride down said Canyon the said mule "Chiggers" tried several times to squeeze past the mule in front of him on the trail, and on the outside or precipice side of the Canyon, and plaintiff was not able to control him.

#### XI.

Several miles down the canyon plaintiff exchanged mules with a member of the party who was an experienced rider, and plaintiff then and there told the guide that he (plaintiff) could not control "Chiggers" but that this other person could. Nevertheless said guide required the plaintiff to immediately remount and proceed upon that same "Chiggers" and plaintiff did so, without any realization of the consequences, as herein set out.

#### XII.

Almost immediately thereafter "Chiggers" took his former trick of passing forward, and in about an hour he started bucking and threw plaintiff from his (Chiggers) back, onto the ground and the edge of the trail, and plaintiff did strike upon the lower portion of his back and suffered great pain therefrom and lay in this place and condition for a period of four hours before he received any medical attention.

## XIII.

That as a result of the said fall the Plaintiff did receive a fracture of the right transverse process of the 12th dorsal vertebra.

## XIV.

That by reason of the same the Plaintiff did suffer continuous pain and discomfort at the small of his back and right hip. That such pain continues even to the present time.

## XV.

That by reason thereof he has been obliged to and has remained away from his work as a plastering contractor, and has been obliged to and has [18] remained away from his work as a plastering contractor, and has been obliged to and has received hospitalization and the attention of physicians.

## XVI.

That by reason of the said injury to his spine and hip the plaintiff has been damaged in the sum of Ten Thousand Dollars (\$10,000.00) and has paid, or been obligated to pay to said physicians the sum of Three Hundred and Seventy Dollars/50c, and has lost an additional sum of Seventeen Hundred and Eighty-five Dollars (\$1,785.00) by reason of his absence from his work.

## XVII.

That no part of any of said sums has been paid and the whole thereof is now unpaid to the Plaintiff.



Wherefore, Plaintiff prays for judgment against the defendant in the sum of Twelve Thousand One Hundred and Fifty-five dollars and fifty cents (\$12,155.50) and interests and costs.

WALTER GOULD LINCOLN,  
Attorney for Plaintiff.

[Endorsed]: Filed Aug. 22, 1945. [19]

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[Title of District Court and Cause.]

ANSWER TO AMENDED COMPLAINT

Comes Now the Defendant Fred Harvey, a corporation, and answering plaintiff's amended complaint for itself alone, and as a first defense thereto, admits, alleges and denies as follows:

I.

Alleges that said amended complaint, nor any part nor paragraph thereof, fails to and does not state a claim upon which relief can be granted to the plaintiff.

And as a second, separate and distinct defense thereto, this answering defendant admits, alleges and denies as follows:

I.

Answering Paragraph III, this answering defendant admits that the Colorado River runs in a general easterly and westerly direction at the

base of the said south rim of the Grand Canyon of the Colorado which is about a mile above the surface of said river; and save and except as herein specifically admitted, this answering defendant denies generally and specifically each, all [20] and every allegation in said paragraph contained.

## II.

Answering Paragraph IV, this answering defendant admits that plaintiff herein rode on the back of the mule on June 17, 1942, but denies that this defendant did maintain and conduct excursion trips for the guests of the hotel and the general public consisting of a ride on the back of a mule down the said canyon to the Colorado River and back, and on and along said "Bright Angel Trail."

## III.

Answering that portion of Paragraph V, commencing with the word "Prior," Line 1, Page 3, down to and through to the end of said paragraph, this answering defendant alleges that it does not have sufficient information or belief to enable it to answer the allegation therein contained and placing its denial on that ground, denies generally and specifically each, all and every allegation therein contained.

## IV.

Answering Paragraph VI, this answering defendant denies generally and specifically each, all and every allegation therein contained.

V.

Answering Paragraph VII, this answering defendant denies generally and specifically each, all and every allegation therein contained.

VI.

Answering Paragraph VIII, this answering defendant denies generally and specifically each, all and every allegation therein contained.

VII.

Answering Paragraph IX, down to and including the word "mules," Line 1, Page 4, this answering defendant alleges that it has not sufficient information or belief to enable it to answer [21] same and placing its denial on that ground, denies generally and specifically each, all and every allegation therein contained.

VIII.

Answering Paragraph X, this answering defendant alleges that it does not have sufficient information or belief to enable it to answer same and placing its denial on that ground, denies generally and specifically each, all and every allegation contained therein.

IX.

Answering Paragraph XI, this answering defendant alleges that it does not have sufficient information or belief to enable it to answer same and placing its denial on that ground, denies generally and specifically each, all and every allegation contained therein.

## X.

Answering Paragraph XII, this answering defendant alleges that it does not have sufficient information or belief to enable it to answer the same and therefore for want of said information and belief denies generally and specifically each, all and every of the allegation therein contained.

## XI.

Answering Paragraph XIII, this answering defendant alleges that it does not have sufficient information or belief to enable it to answer the allegations of said paragraph, and therefore for want of said information or belief, denies generally and specifically each and all and every of the allegations therein contained.

## XII.

Answering Paragraph XIV, this answering defendant alleges that it does not have sufficient information or belief to enable it to answer the allegations of said paragraph, and therefore for want of said information or belief, denies generally and specifically each and all and every of the allegation therein contained. [22]

## XIII.

Answering Paragraph XV, this answering defendant alleges that it does not have sufficient information or belief to enable it to answer the allegations of said paragraph, and therefore for want of said information or belief, denies generally and specifically each and all and every of the allegations therein contained.



## XIV.

Answering Paragraph XVI, this answering defendant alleges that it has not sufficient information or belief to enable it to answer the allegations of said paragraph, and therefore for want of said information or belief, denies generally and specifically each and all and every of the allegations therein contained, or that by reason of any matter alleged in plaintiff's complaint, or otherwise or at all the plaintiff has been damaged in the sum of Ten Thousand Dollars (\$10,000.00) or any other sum, or has paid or has been obliged to pay to any physician the sum of \$370.50, or any other sum, or has lost an additional or any sum of \$1785.00, or any other sum by reason of his or any absence from his or any work.

## XV.

Denies any liability upon the part of this answering defendant by reason of any matters set forth in plaintiff's amended complaint.

And as a third, separate and distinct defense thereto, this answering defendants admits, alleges and denies as follows:

## I.

That the accident referred to in plaintiff's amended complaint was an inevitable and unavoidable accident in so far as this answering defendant is concerned.

And as a fourth, separate and distinct defense thereto, this answering defendants admits, alleges and denies as follows: [23]

## I.

That in riding said mule referred to in plaintiff's amended complaint, immediately prior to and up to the time of the happening of the accident referred to in plaintiff's amended complaint, the plaintiff himself had voluntarily assumed any risk to the riding of said mule.

Wherefore, this answering defendant prays that plaintiff take nothing, and that it be dismissed hence with its costs of suit incurred, and for such and further relief as to the court may seem just.

SCHELL & DELAMER,

By GERALD F. H. DELAMER,

A member of the firm,

Attorneys for Fred Harvey, a corporation.

[Endorsed]: Filed Sept. 7, 1945. [24]

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[Title of District Court and Cause.]

STIPULATION FOR PRETRIAL

In conformity with the order for pretrial hearing,  
It Is Hereby Stipulated:

## I.

Facts Claimed by Plaintiff and Admitted  
by Defendant

On June 17, 1942, and for many years prior thereto, the defendant has maintained a resort hotel on the south rim of the Grand Canyon in Arizona;

that there were a number of trails in and about said resort hotel, including the Bright Angel and Kabib, which led from the south rim to the Colorado River; that the defendant owned a large number of mules available for use by people who desired to ride said mules upon said trails. Said mules were furnished for a consideration and that the people riding said mules went in numbers not exceeding ten, preceded by a guide, an employee of the defendant; that the mules so used upon said trails were [25] first used in the packing of materials and supplies, either carrying said supplies or being ridden by the packers. After a time, and when the packers had decided that the mule was well broken in he was then used in the dude string, that is, the carrying of persons. At first after being put in the dude string they would be ridden by the guides for some period of time and when considered well broken and completely safe they were then ridden by persons other than defendant's employees.

Plaintiff arranged with the defendant to take a trip to Phantom Ranch and paid the established price therefor. On the morning of June 17, 1942, plaintiff and his wife presented themselves at the appointed place and were assigned to mules. The mules were selected by the guides and the riders assigned on the basis of weight. The mules assigned to plaintiff was known as "Chigger." The party in which plaintiff was riding consisted of seven riders, preceded by a guide, Bob Ennis. Chigger had been used as a pack and guide mule in the

canyon for two years before he became part of the dude string, and thereafter for the following two years he carried riders other than guides. During the winter month Chigger had not been used and had been in pasture, and the trip above mentioned was the first trip down the canyon for Chigger that season. The party started down the Bright Angel trail with the guide in the lead and Chigger being the last mule in the string. The ride proceeded for two or three hours, at the end of which the party arrived at Indian Gardens and stopped for a rest and lunch. After the rest and luncheon the party again mounted and continued on down the trail and after having traveled for about half an hour to an hour plaintiff was thrown from Chigger and as a result of the fall received certain injuries. [26]

Facts Claimed by the Plaintiff and Not Admitted by the Defendant, or Claimed to Be Irrelevant or Immaterial to the Issues Here Involved.

Plaintiff and his wife, while at the hotel, read and believed a circular gotten out by the Corporation, in which was printed the following: "Trail Trips into the Canyon. Although visitors may venture short distances down these trails on foot, the accepted mode of travel for longer journeys is by the famous Grand Canyon mules. These faithful, sure-footed animals, in charge of experienced guides, hold a 30 years' record of carrying many thousands of inexperienced riders down the trail and back in perfect safety." Plaintiff inquired



at the ticket booth in the lobby of the hotel about the mule excursion and remarked that he had never ridden a mule or a horse before. He was told by the clerk that most of those who took the mule trips were inexperienced riders. Thereupon, plaintiff bought tickets for himself and wife. The other riders in plaintiff's group let their reins hang from the saddle horns, but plaintiff was instructed by the guide to hold the reins in his hands at all times. On the ride down the trail Chigger tried several times to squeeze past a mule ahead on the outside or precipice side of the trail. Upon resuming the journey plaintiff changed mules with an experienced rider, but after explaining to the guide that he could not handle Chigger, he was required to remount and proceed on that animal. Almost immediately Chigger took up his old trick of pressing forward. In a half hour or so, while Chigger was pressing the mule ahead, plaintiff reined him back and Chigger started bucking, throwing and seriously injuring plaintiff. [27]

Facts Claimed by the Defendant and Not  
Admitted by the Plaintiff

That Chigger was a very tractable mule and that no difficulty had been encountered in training him, and that for two years, to-wit, the seasons of 1940 and 1941, Chigger had been ridden by dudes (persons other than guides), including women and children, and that he had never been known to buck or display any vicious tendencies, but had always been a safe, quiet and reliable mule; that

all persons were instructed to hold the reins of an animal they were riding and that such is a good and accepted practice, and enables the riders to control the animal and also to assist the animal in the event it should stumble. That unlike horses, mules do not become fractious or difficult to handle if they have not been ridden for a long time, but that on the contrary, constant use hardens the muscles and increases the endurance of a mule and that on a first trip the mule would be much more prone to become tired and less ambitious, particularly after he had carried a person for several hours. The defendant had never experienced any trouble with any mules on their first trip after having rested for the winter, except that the mules tired more easily. That if plaintiff had any difficulty with the mule in trying to keep him in line (no claim being made that the mule bucked on any previous occasion) that fact was not indicated to the guide, and that plaintiff assumed any hazard which existed. Plaintiff was in charge of said animal and defendant exercised no control of the animal after plaintiff mounted him.

## II.

Plaintiff has exhibited to opposing counsel all the documents intended to be offered at the trial, which are as follows: Exhibits 1, 2, 3, 4 and 5 heretofore offered in evidence in the previous trial, six colored postcards picturing El Tobar Hotel and the Bright Angel Trail [28]

Defendant has exhibited to plaintiff photographs showing the mule Chigger in various groups, showing the mule to have been ridden by women and children.

Each party reserves the right of objections as to the materiality, competency and relevancy of any of the foregoing exhibits.

III.

Counsel for plaintiff estimates the time of the trial to be two days, counsel for defendant, three days.

/s/ WALTER GOULD LINCOLN,  
Attorney for Plaintiff.

SCHELL & DELAMER,  
By /s/ W. O. SCHELL,  
Attorneys for Defendant.

[Endorsed]: Filed Feb. 14, 1946. [29]

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[Title of District Court and Cause.]

DEFENDANT'S OBJECTIONS TO INSTRUCTIONS AND SPECIAL INTERROGATORIES PROPOSED BY PLAINTIFF

In the copy of the proposed instruction served upon defendant's counsel, the instructions bear no number or identifying designation except those taken from the Book of Approved Jury Instructions; hence, we have numbered the pages con-

secutively on the assumption that the proposed instructions delivered to the Court were in the same order.

1.

Instruction appearing on page 4, being BAJI No. 6:

We do not believe this instruction is applicable in the Federal Court.

2.

Instruction appearing on page 7, being BAJI No. 9:

Likewise, we do not believe this instruction is applicable in Federal Court because it tells the jury that [58] nine may agree upon a verdict.

3.

Instruction appearing on page 16:

We do not believe there will be any evidence that the defendant corporation entered into any such contract.

4.

Instruction appearing on page 17:

Even if the matters alleged in the first paragraph of this instruction were true and the defendant knew thereof, such facts would not necessarily render the defendant liable for any injuries which followed to Mr. Mateas, and certainly before these matters, if true, could impose liability on the defendant corporation they would have to be a proximate cause of said injuries. Likewise, even



if these matters were true, the entire evidence might fail to disclose liability upon the part of the defendant corporation.

5.

Instructions appearing on pages 18 and 19:

These instructions are to the effect that the defendant impliedly warranted that the mule was suitable for the purpose for which it was hired and would carry Mr. Mateas safely down the trail. Such is not the law. The only implied warranty on the part of the defendant was a warranty that it had used reasonable care to ascertain that the mule was suitable for the purpose for which it was hired.

6.

Instruction appearing on page 20:

This instruction places the duty of utmost care and diligence upon the defendant. The only duty imposed upon the defendant was to exercise reasonable care to ascertain that the mule was suitable for the purpose for which it was hired. [59]

7.

Instruction appearing on page 21:

This instruction is meaningless and would tend to confuse the jury.

8.

Instruction appearing on page 24:

This instruction, if given, would be confusing to the jury and might be construed by them as entitling them to award the plaintiff the amount

prayed for irrespective of the nature of the proof as to damages sustained by him as the proximate result of the accident.

In support of Objections Nos. 3 to 7, inclusive, we submit that the owner of a mule hiring the same is not an insurer, and the burden is on the plaintiff to prove that the mule was dangerous and unsuitable for the purpose for which it was hired, and that either the defendant knew that fact or in the exercise of reasonable care should have known that fact.

We respectfully cite this Court to the opinion of the Circuit Court of Appeal, upon the appeal in this case:

Mateas vs. Fred Harvey, 146 Fed. (2) 989;  
Dam vs. Lake Aliso, 6 Cal. (2d) 395;  
Kersten vs. Young, 52 Cal. App. (2d) 1;  
Heath vs. Fruzia, 50 Cal. App. (2d) 598.

The defendant objects to each and all of the proposed questions requested by the plaintiff to be propounded to the jury on the ground that these questions, nor any of them, do not involve any issues in the case.

Respectfully submitted,  
SCHELL & DELAMER,  
By W. O. SCHELL,  
Attorneys for Defendant.

[Affidavit of Service by Mail.]

[Endorsed]: Filed Sept. 26, 1947. [60]

[Title of District Court and Cause.]

JURY INSTRUCTIONS REQUESTED BY  
DEFENDANT, FRED HARVEY, A COR-  
PORATION [61]

The defendant, Fred Harvey, a corporation, requests the Court to give the jury the following instructions and each of them. [62]

Defendant's Requested Instruction No. 1

It becomes my duty as judge to instruct you in the law that applies to this case, and it is your duty as jurors to follow the law as I shall state it to you. On the other hand, it is your exclusive province to determine the facts in the case, and to consider and weigh the evidence for that purpose. The authority thus vested in you is not an arbitrary power, but must be exercised with sincere judgment, sound discretion, and in accordance with the rules of law stated to you. [63]

Defendant's Requested Instruction No. 2

On the other hand, your own authority to judge the evidence and to determine the facts in the case has this limitation: it is not an arbitrary power, but must be exercised with sincere judgment, sound discretion, and in accordance with the rules of law stated to you. [64]

Defendant's Requested Instruction No. 3

At times through out the trial the Court has been called upon to pass on the question whether

or not certain offered evidence might properly be admitted. You are not to be concerned with the reasons for such rulings and are not to draw any inferences from them. Whether offered evidence is admissible is purely a question of law. In admitting evidence to which an objection is made, the court does not determine what weight should be given such evidence; nor does it pass on the credibility of the witness. As to any offer of evidence that has been rejected by the Court, you, of course, must not consider the same; as to any question to which an objection was sustained, you must not conjecture as to what the answer might have been or as to the reason for the objection. [65]

#### Defendant's Requested Instruction No. 4

You must weigh and consider this case without regard to sympathy, prejudice, or passion for or against either party to the action. [66]

#### Defendant's Requested Instruction No. 5

It is your duty as jurors to consult with one another and to deliberate, with a view to reaching an agreement, if you can do so without violence to your individual judgment. You each must decide the case for yourself, but should do so only after a consideration of the case with your fellow jurors, and you should not hesitate to change an opinion when convinced that it is erroneous. However, you should not be influenced to vote in any way on any question submitted to you by the single fact



that a majority of the jurors, or any of them, favor such a decision. In other words, you should not surrender your honest convictions concerning the effect or weight of evidence for the mere purpose of returning a verdict or solely because of the opinion of the other jurors. [67]

#### Defendant's Requested Instruction No. 6

In civil actions the party who asserts the affirmative of an issue must carry the burden of proving it: In other words, the "burden of proof" as to that issue is on that party. This means that if no evidence were given on either side of such issue, your finding as to it would have to be against that party. When the evidence is contradictory, the decision must be made according to the preponderance of evidence, by which is meant such evidence as, when weighed with that opposed to it, has more convincing force, and from which it results that the greater probability of truth lies therein. Should the conflicting evidence be evenly balanced in your minds, so that you are unable to say that the evidence on either side of the issue preponderates, then your finding must be against the party carrying the burden of proof, namely, the one who asserts the affirmative of the issue. [68]

#### Defendant's Requested Instruction No. 7

Whenever in these instructions I state that the burden, or the burden of proof, rests upon a certain party to prove a certain allegation made by him, the meaning of such an instruction is this: that



unless the truth of that allegation is proved by a preponderance of the evidence, you shall find the same to be not true.

The term "preponderance of the evidence" means such evidence as, when weighed with that opposed to it, has more convincing force, and from which it results that the greater probability of truth lies therein. [69]

#### Defendant's Requested Instruction No. 8

You shall not consider as evidence any statement of counsel made during the trial, unless such statement was made as an admission or stipulation conceding the existence of a fact or facts.

You must not consider for any purpose any offer of evidence that was rejected, or any evidence that was stricken out by the court; such matter is to be treated as though you never had known of it.

You are to decide this case solely upon the evidence that has been received by the court, and the inferences that you may reasonably draw therefrom, and such presumptions as the law deduces therefrom, as noted in my instructions, and in accordance with the law as I state it to you. [70]

#### Defendant's Requested Instruction No. 9

In judging the credibility of witnesses, you shall have in mind the law that a witness is presumed to speak the truth. This presumption, however, may be overcome by contradictory evidence, by the manner in which the witness testifies, by the character of his testimony, or by evidence that pertains to his motives. [71]

## Defendant's Requested Instruction No. 10

Negligence is the doing of some act which a reasonably prudent person would not do, or the failure to do something which a reasonably prudent person would do, actuated by those considerations which ordinarily regulate the conduct of human affairs. It is the failure to use ordinary care in the management of one's property or person. [72]

## Defendant's Requested Instruction No. 11

Negligence is not an absolute term, but a relative one. By this we mean that in deciding whether there was negligence in a given case, the conduct in question must be considered in the light of all the surrounding circumstances, as shown by the evidence. [73]

## Defendant's Requested Instruction No. 12

You will note that the person whose conduct we set up as a standard is not the extraordinarily cautious individual, nor the exceptionally skillful one, but a person of reasonable and ordinary prudence. While exceptional skill is to be admired and encouraged, the law does not demand it as a general standard of conduct. [74]

## Defendant's Requested Instruction No. 13

Ordinary care is that care which persons of ordinary prudence exercise in the management of their own affairs in order to avoid injury to themselves or to others. [75]

## Defendant's Requested Instruction No. 14

The proximate cause of an injury is that cause which, in natural and continuous sequence, unbroken by any efficient intervening cause, produces the injury, and without which the result would not have occurred. It is the efficient cause—the one that necessarily sets in operation the factors that accomplish the injury. [76]

## Defendant's Requested Instruction No. 15

This does not mean that the law seeks and recognizes only one proximate cause of an injury, consisting of only one factor, one act, one element of circumstance, or the conduct of only one person. To the contrary, the acts and omissions of two or more persons may work concurrently as the efficient cause of an injury, and in such a case, each of the participating acts or omissions is regarded in law as a proximate cause. [77]

## Defendant's Requested Instruction No. 16

The burden is upon the plaintiff to prove by a preponderance of the evidence that the defendant was negligent and that such negligence was a proximate cause of injury to the plaintiff. [78]

## Defendant's Requested Instruction No. 17

The mere fact that an accident happened, considered alone, does not support an inference that some party, or any party, to this action was negligent. [79]

## Defendant's Requested Instruction No. 18

Likewise it is not sufficient for the plaintiff to establish that he received injuries in the accident involved in this case but the plaintiff must go further and prove by a preponderance of the evidence that the accident and resulting injuries to him were proximately due to the negligence of the defendant.

## Defendant's Requested Instruction No. 19

The law does not permit you to guess or speculate as to the cause of the accident in question. If the evidence is equally balanced on the issue of negligence or proximate cause, so that it does not preponderate in favor of the party making the charge, then he has failed to fulfill his burden of proof. To put the matter in another way, if after considering all the evidence, you should find that it is just as probable that either the defendant was not negligent or if he was, his negligence was not a proximate cause of the accident, as it is that some negligence on his part was such a cause, then a case against the defendant has not been established. [81]

## Defendant's Requested Instruction No. 20

In law we recognize what is termed an unavoidable or inevitable accident. These terms do not mean literally that it was not possible for such an accident to be avoided. They simply denote an accident that occurred without having been proximately caused by negligence. Even if such an accident could have been avoided by the exercise of exceptional foresight, skill or caution, still, no one may be held liable for injuries resulting from it.



## Defendant's Requested Instruction No. 21

The defendant was not an insurer of the safety of the plaintiff.

Mateas vs. Fred Harvey.

(Decision on appeal in this case.) [83]

## Defendant's Requested Instruction No. 22

The obligation upon the defendant in this case was a contractual obligation against reckless or heedless hiring out of a mule without reasonable care to ascertain the habits of said mule with respect to its safety and suitabilities for the purpose for which it was hired.

Dam vs. Lake Aliso Riding School,

6 Cal. (2d) 395, 400.

Mateas vs. Fred Harvey.

(Decision on appeal in this case.) [84]

## Defendant's Requested Instruction No. 23

If you find that the defendant did at all times exercise reasonable care to ascertain the habits and disposition of the mule involved in this case, and that as a result of the information so obtained a reasonably prudent person situated as was the defendant would have concluded that said mule was fit and suitable for the purpose of carrying the plaintiff upon the excursion involved in this case, then your verdict must be against the plaintiff and in favor of the defendant.

Dam vs. Lake Alliso Riding School,

6 Cal. (2d) 395, 399.

Mateas vs. Fred Harvey.

(Decision on appeal in this case.) [85]

## Defendant's Requested Instruction No. 24

If you find that the defendant at all times exercised the care of a reasonably prudent person to furnish to the plaintiff a mule which was fit and suitable for the purpose of carrying the plaintiff upon the excursion involved in this case then the defendant was not guilty of negligence and your verdict must be for the defendant. [86]

## Defendant's Requested Instruction No. 25

Contributory negligence is negligence on the part of a person injured which, cooperating in some degree with the negligence of another, helps in proximately causing the injury of which the former thereafter complains.

One who is guilty of contributory negligence may not recover from another for the injury suffered.

## Defendant's Requested Instruction No. 26

The law forbids you to attempt to classify negligence into degrees or grades or kinds, or to compare one instance of negligence with another and judge which is more deserving of reproof or excuse. If you should find that there was negligent conduct on the part of more than one person, you are not to attempt to determine which was guilty of the greater negligence, with a view to delivering a verdict in favor of, or to favor in any way, the one whose conduct was the less reprehensible. [88]

## Defendant's Requested Instruction No. 27

There is a legal principle commonly referred to by the term "assumption of risk." A person is said to assume a risk when he knows or in the exercise of ordinary care would know that a danger exists in connection with an enterprise, but nevertheless voluntarily undertakes that enterprise.

A person who thus assumes a risk is not entitled to recover for injuries or damage resulting to him from the risk so assumed by him. [89]

## Defendant's Requested Instruction No. 28

If you find that the plaintiff in this case was injured as the result of a risk inherent in the nature of the excursion which plaintiff was making and which plaintiff as a reasonably prudent man should have realized before undertaking said excursion then the plaintiff cannot recover in this action and your verdict must be for the defendant. [90]

## Defendant's Requested Instruction No. 29

Your attention is called to a distinction between contributory negligence and assumption of risk. Contributory negligence must contribute in some degree as a proximate cause to the happening of the accident. Assumption of risk, however, bars recovery for injuries although it plays no part in causing the accident except merely to expose the person to the danger. [91]

## Defendant's Requested Instruction No. D-1

Damages must be reasonable. In the event that your verdict is for the plaintiff, you can award him only such damages as will fairly and reasonably compensate him for the injuries or damages which you believe from a preponderance of the evidence he has sustained as a direct, natural and proximate result of the accident. [92]

## Defendant's Requested Instruction No. D-2

If your verdict is in favor of the plaintiff, in arriving at the amount thereof you must consider only the actual pecuniary injury which the plaintiff has sustained, if any, as the direct, natural and proximate result of the accident involved in this case. It is only such actual pecuniary damage, if any, and nothing else which the plaintiff can recover in this case, if he recover at all. [93]

## Defendant's Requested Instruction No. D-3

Neither the allegations of the complaint as to the amount of damage plaintiff claims to have suffered, nor the prayer asking for certain compensation, is to be considered by you in arriving at your verdict, except in this one respect, that the amount of damage alleged in the complaint does fix a maximum limit, and you are not permitted to award plaintiff more than that amount. [94]



## Defendant's Requested Instruction No. D-4

Throughout these instructions I have instructed you as to the measure of damages which the plaintiff is entitled to recover in the event that you find that your verdict is for the plaintiff. I have done so because the law imposes this duty upon me. The fact that I have instructed you as to the measure of damages in this case is not to be taken by you in any sense as an intimation that I feel that you should or should not return a verdict either for the plaintiff or for the defendant. Such instructions are intended for your guidance only in the event that you find from the evidence that your verdict is for the plaintiff, and if you believe from the evidence that the defendant was not negligent in some respect as charged in the complaint, or that any negligence on the part of the defendant was not a proximate cause of the accident, or that the plaintiff was guilty of negligence proximately contributing to the happening of the accident, or that plaintiff had assumed the risk which caused him injury, then your verdict must be against the plaintiff and in favor of the defendant and you are further instructed that in such event you are to disregard entirely all instructions which I have given you concerning the measure of damages. [95]

Received copy of the within Jury Instructions this 24th day of September, 1947.

/s/ WALTER GOULD LINCOLN,  
Attorney for Plaintiff.

[Endorsed]: Filed Oct. 6, 1947. [96]

[Title of District Court and Cause.]

ADDITIONAL JURY INSTRUCTIONS REQUESTED BY DEFENDANT FRED HARVEY, A CORPORATION

Defendant's Requested Instruction No. A1

The mere fact that an accident happened considered alone does not give rise to an inference that the defendant breached any warranty. [98]

Defendant's Requested Instruction No. A2

There is no evidence in this case that the defendant made any express warranty that the plaintiff would make the trip involved in this case in safety.

Defendant's Requested Instruction No. A3

Where there is no evidence of an express warranty having been made you must find that no such warranty was made. [100]

Defendant's Requested Instruction No. A4

If you find that the defendant did at all times exercise reasonable care to ascertain the habits and disposition of the mule involved in this case and that as a result of the information so obtained a reasonable prudent person situated as was the defendant would have concluded that said mule was fit and suitable for the purpose of carrying the plaintiff upon the trip involved in this case then you must find that the defendant did not breach any express warranty. [101]

## Defendant's Requested Instruction No. A5

The only implied warranty made by the defendant in this case was a warranty against the reckless or heedless hiring out of a mule without having exercised reasonable care to ascertain the habits of said mule with respect to its safety and suitability for the purposes for which it was hired. [102]

## Defendant's Requested Instruction No. A6

If you find that the defendant did at all times exercise reasonable care to ascertain the habits and disposition of the mule involved in this case and that as a result of the information so obtained a reasonable prudent person situated as was the defendant would have concluded that said mule was fit and suitable for the purpose of carrying the plaintiff upon the trip involved in this case then you must find that the defendant did not breach any implied warranty. [103]

## Defendant's Requested Instruction No. A7

If you find that the defendant at all times exercised the care of a reasonably prudent person to furnish to the plaintiff a mule which was fit and suitable for the purpose of carrying the plaintiff upon the trip involved in this case then your verdict must be for the defendant. [104]

## Defendant's Requested Instruction No. A8

The mere fact that the mule may have bucked at the time of the accident involved in this case

is not sufficient to establish a breach of any warranty or that the mule was not fit or suitable for the purpose for which it was hired. [105]

Received copy of the within Additional Instructions this 2nd day of October, 1947.

/s/ WALTER GOULD LINCOLN,  
Attorney for Plaintiff.

[Endorsed]: Filed Oct. 6, 1947. [106]

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In the District Court of the United States, Southern  
District of California, Central Division

No. 3179-WM Civil

ELMER H. MATEAS,

Plaintiff,

vs.

FRED HARVEY, a corporation, et al.,

Defendants.

### VERDICT

We, the jury in the above entitled cause, find in favor of the plaintiff, Elmer H. Mateas, and against the defendant, Fred Harvey, a corporation, and assess the plaintiff's damages in the sum of \$7,500.00.

Los Angeles, California, October 6, 1947.

/s/ GEO. G. WALKER,  
Foreman of the Jury.

[Endorsed]: Filed Oct. 6, 1947. [112]



In the District Court of the United States, Southern  
District of California, Central Division

3179-WM Civil

ELMER H. MATEAS,

Plaintiff,

vs.

FRED HARVEY, a corporation, et al.,

Defendants.

### JUDGMENT

The above entitled cause having come on regularly for trial on September 23rd, 1947, before the Honorable Wm. C. Mathes, District Judge, sitting with a jury. The jury was duly impanelled and sworn to try the cause. Evidence, both oral and documentary was introduced. On motion of the plaintiff the cause was dismissed as to all defendants other than the defendant Fred Harvey, a corporation. At the conclusion of the evidence the cause was argued to the jury by counsel for the respective parties, and the court instructed the jury on the law of the case, whereupon the jury retired in charge of the bailiffs, duly sworn, to consider their verdict. The jury returned into court with their verdict in words and figures as follows: "In the District Court of the United States, Southern District of California, Central Division. Elmer H. Mateas, Plaintiff, vs. Fred Harvey, a corporation, et al., Defendants. No. 3179-WM Civil.

Verdict: We, the jury in the above entitled cause, find in favor of the plaintiff, Elmer H. Mateas, and against the defendant, Fred Harvey, a corporation, and assess the plaintiff's damages in the sum of \$7,500.00. Los Angeles, California, October 6, 1947. Geo. G. Walker, Foreman of the Jury." The verdict was ordered filed and entered, and the Clerk was directed to enter judgment in accordance with the verdict.

Wherefore, by reason of the premises aforesaid and the law, it is ordered that the plaintiff, Elmer H. Mateas, do have and recover from Fred Harvey, a corporation, defendant, the sum of seven thousand five hundred dollars (\$7,500.00), and have execution therefor.

Costs taxed at \$109.65.

EDMUND L. SMITH,  
Clerk,

By /s/ LOUIS J. SOMERS,  
Deputy Clerk.

Judgment entered Oct. 6, 1947, and docketed Oct. 6, 1947, Book 46, Page 190.

[Endorsed]: Filed Oct. 6, 1947. [113]

[Title of District Court and Cause.]

### MOTION FOR NEW TRIAL

Comes now the defendant, Fred Harvey, a corporation, and moves the above entitled Court for a new trial and for an order vacating and setting aside the judgment heretofore entered in favor of the plaintiff and against this moving defendant. Said motion is made upon the following grounds and each of them, to-wit:

1. Irregularity in the proceedings of the adverse party and his attorney by which the defendant was prevented from having a fair trial in that in his closing argument plaintiff's counsel repeatedly referred to the matter of negotiations for settlement and discussions of settlement alleged to have occurred on July 6, 1942, in direct conflict to the court's prior ruling in connection with the same conversation.

2. Misconduct of the jury.

3. Accident and surprise which ordinary prudence could [114] not have guarded against.

4. Excessive damages appearing to have been given under passion or prejudice.

5. Insufficiency of evidence to justify the verdict in that the evidence is insufficient to justify the implied finding of the jury that the defendant breached any warranty or that said defendant failed to exercise ordinary care in ascertaining the disposition of the mule at any time prior to the happening of the accident forming the basis of plain-

tiff's claim. On the further ground that the evidence shows that plaintiff assumed the risk of any injuries resulting from the use of said mule. Upon the further ground that the evidence of the injuries sustained by plaintiff does not justify an award of \$7500.00.

6. Errors at law occurring at the trial, to-wit: error in admission of evidence of conversations between the plaintiff and one Bole occurring prior to the happening of said accident and not taking place within the hearing or in the presence of the defendant or any of its agents, servants or employees. On the further ground that Instruction No. 16 given by the Court limits the assumption of risk to an accident not proximately contributed to by the negligence of the defendant and the refusal to give defendant's Requested Instruction No. 27.

Respectfully submitted,

W. O. SCHELL,

A member of the law firm of Schell & Delamer,  
attorneys for the defendant, Fred Harvey, a  
corporation. [115]



## NOTICE OF MOTION

To the Plaintiff, Elmer H. Mateas, and to Walter Gould Lincoln, Esq., His Attorney:

You and Each of You Will Please Take Notice that the foregoing motion for a new trial and for an order of the Court vacating and setting aside the judgment heretofore entered in favor of the plaintiff and against the defendant will be brought on before the above entitled Court in the Department of the Honorable William C. Mathes at such time and place as may be designated by said Court.

Said motions will be based upon the foregoing written Motion and upon all the pleadings, records, files and the minutes of the Court in the above entitled matter and upon the Memorandum of Points and Authorities accompanying this Notice of Motion.

Dated: October 15, 1947.

W. O. SCHELL,

A member of the law firm of Schell & Delamer, attorneys for the defendant, Fred Harvey, a corporation.

(Affidavit of Service by Mail.)

[Endorsed]: Filed Oct. 16, 1947. [116]

[Title of District Court and Cause.]

ORDER DENYING MOTION OF DEFEND-  
ANT, FRED HARVEY, A CORPORATION,  
FOR A NEW TRIAL

This cause having heretofore come before the court for hearing on the motion of defendant, Fred Harvey, a corporation, for a new trial, and the motion having been heard and submitted for decision,

It Is Now Ordered that the motion of defendant, Fred Harvey, a corporation, for a new trial be and is hereby denied; and

It Is Further Ordered that the Clerk this day forward copies of this order by United States mail to the attorneys for the parties appearing in this cause.

December 10, 1947.

WM. C. MATHES,  
United States District Judge.

[Endorsed]: Filed Dec. 10, 1947. [117]

[Title of District Court and Cause.]

### NOTICE OF APPEAL

To the Plaintiff, Elmer H. Mateas, and to Walter Gould Lincoln, his attorney:

Notice Is Hereby Given that Fred Harvey, a corporation, defendant in the above entitled cause, does hereby appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the final judgment and the whole thereof, entered in the within action on the 6th day of October, 1947, in favor of said plaintiff and against said defendant.

Dated this 8th day of January, 1948.

SCHELL & DELAMER,  
By GERALD F. H. DELAMER,  
Attorneys for Defendant and Appellant, Fred Harvey, a corporation.

[Endorsed]: Filed Jan. 8, 1948. [118]

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[Title of District Court and Cause.]

### STATEMENT OF POINTS UPON WHICH APPELLANT INTENDS TO RELY IN THE APPEAL OF THIS CASE

#### I.

That the trial court committed error in admitting in evidence the testimony of the witness Ella W.

Vogel as to conversations which she heard between the plaintiff and a Mr. Boles, which conversations did not take place in the presence of or within the hearing of the defendant or any of its agents, servants or employees, and which testimony appears in the Reporter's transcript on pages 141 to 148, inclusive.

II.

That the court committed error in the giving to the jury of the following instruction:

"The defendant was not an insurer of the safety of the plaintiff. The plaintiff assumed all risks which he knew, or in the [123] exercise of ordinary care should have known, were inherent in the trip; but the plaintiff did not assume any risk which was proximately caused by failure of the defendant, either before or at the time of the accident, to exercise ordinary care under the circumstances."

Dated: January 20, 1948.

SCHELL & DELAMER,

By GERALD F. H. DELAMER,

Attorneys for Defendant and Appellant, Fred Harvey, a corporation.

Received copy of the within this 20 day of January, 1948.

/s/ WALTER GOULD LINCOLN,  
Attorney for Plaintiff.

[Endorsed]: Filed Jan. 20, 1948. [134]



[Title of District Court and Cause.]

DESIGNATION OF RECORD ON APPEAL

To the Clerk of the United States District Court  
for the Southern District of California, Central  
Division:

You Will Please Prepare a transcript of the record  
of this case to be used upon appeal in the above en-  
titled case embodying the following:

1. The complaint;
2. The petition for removal from state to fed-  
eral court;
3. Notice of motion to remove to federal court;
4. Bond on said removal;
5. Order for removal to federal court;
6. Second amended complaint;
7. Answer to amended complaint filed the 6th  
day of September, 1945;
8. Stipulation for pre-trial;
9. Order on pre-trial hearing; [125]
10. Defendant's objections to instructions and  
interrogatories proposed by plaintiff;
11. Plaintiff's objections to proposed instructions  
of defendant;
12. Instructions to the jury requested by de-  
fendant;
13. Verdict;
14. Judgment;
15. Motion for new trial;

16. Notice of said motion (eliminating memorandum of points and authorities in support of said motion);
17. Order denying motion for new trial;
18. Notice of appeal;
19. Supersedeas and cost bond on appeal;
20. Designation of record on appeal;
21. Statement of points upon which appellant intends to rely in the appeal in this case;
22. Reporter's transcript of proceedings upon the trial (2 copies of which have been heretofore furnished you);
23. Plaintiff's exhibits 6 and 6A;
24. Defendant's exhibits I-1 to I-14, inc.;
25. Defendant's exhibits E, F and G;
26. Order for transfer of original exhibits.

Dated: January 20, 1948.

SCHELL & DELAMER,

By GERALD F. H. DELAMER,

Attorneys for Defendant and Appellant, Fred  
Harvey, a corporation.

Received copy of the within this 20 day of January, 1948.

/s/ WALTER GOULD LINCOLN.

[Endorsed]: Filed Jan. 20, 1948. [126]

[Title of District Court and Cause.]

ORDER FOR TRANSFER OF ORIGINAL  
EXHIBITS

It Is Hereby Ordered that the original exhibits now on file in the above entitled matter need not be copied but may be transferred in their original state to the United States Circuit Court of Appeals, for the Ninth Circuit.

Dated at Los Angeles, California, this 20 day of January, 1948.

WM. O. MATHES,  
Judge.

[Endorsed]: Filed Jan. 21, 1948. [127]

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[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the District Court of the United States for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 130, inclusive, contain full, true and correct copies of Complaint for Damages for Personal Injuries; Notice of Motion to Remove to Federal Court; Petition for Removal to Federal Court; Bond on Removal; Order for Removal; Certificate of Clerk of the Superior Court to Removal Papers; Second Amended Complaint; Answer to Amended Complaint; Stipulation for Pretrial; Plaintiff's Proposed Instructions; Defendant's Objections to Instructions and Special Interrogatories Proposed by Plaintiff; Jury In-

structions Requested by Defendant Fred Harvey; Additional Jury Instructions Requested by Defendant Fred Harvey; Plaintiff's Objection to Certain Proposed Instructions of the Defendant; Plaintiff's Objections to Proposed Instructions of Defendants; Verdict; Judgment; Motion for New Trial; Order Denying Motion for a New Trial; Notice of Appeal; Supersedeas and Cost Bond on Appeal; Statement of Points Upon Which Appellant Intends to Rely in the Appeal of this Case; Designation of Record on Appeal; Order for Transfer of Original Exhibits; and Plaintiff's Designation of Additional Portions of the Record and Documents to be Included in the Transcript on Appeal which, together with original plaintiff's exhibits 1-J, 1-K, 1-M, 1-P, 4, 6, 6-A and original defendant's exhibits E, F, G, and I-1 to I-14, inclusive, and copy of reporter's transcript of proceedings on February 19, 1946, September 23 and 30, 1947, and October 1, 2, 3 and 6, 1947, transmitted herewith, constitute the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing, comparing, correcting and certifying the foregoing record amount to \$27.60, which sum has been paid to me by appellant.

Witness my hand and the seal of said District Court this 13 day of February, A. D. 1948.

[Seal]

EDMUND L. SMITH,

Clerk,

By /s/ THEODORE HOCKE,

Chief Deputy.



In the District Court of the United States for  
the Southern District of California, Central  
Division.

Honorable William C. Mathes, Judge Presiding

No. 3179-WM Civil

ELMER H. MATEAS,

Plaintiff,

vs.

FRED HARVEY, a corporation, et al.,

Defendants.

REPORTER'S TRANSCRIPT OF  
PROCEEDINGS

Los Angeles, California

Tuesday, February 19, 1946

Appearances:

For the Plaintiff: Walter Gould Lincoln, Esq.

For the Defendants: Schell & Delamer, Esqs.,  
by W. O. Schell, Esq.

Mr. Lincoln: Ready. In that matter, your Honor,  
we have filed with the clerk the stipulated documents  
which your Honor required.

The Court: I have read the stipulation and the  
memoranda

Mr. Lincoln: Yes, sir.

The Court: Do you have the exhibits, Mr. Clerk?

The Clerk: Yes.

The Court: Would each side wish now to have  
their exhibits marked and identified in the record?

Mr. Lincoln: Well, we should like to, your Honor.

And, in addition to that, there are two or three illustrated postal cards which I have exhibited to counsel and which I would also like to present to the clerk to have filed, but I unfortunately do not have them with me at this time. Mr. Schell, however, has some additional photographs which he has shown to me and which I think he would like to have marked at this time for identification.

Mr. Schell: I take it this marking would mean merely for identification, if the court please?

The Court: Yes. They will be withdrawn and they won't be filed here, they won't be lodged, even. You may take them [2\*] away with you. If you want to bring in other documents, you may do so.

Mr. Schell: Because, frankly, one or two of the exhibits which were in the previous trial we still have objection as to the materiality.

The Court: Yes. What I was seeking to do is to obviate the foundational questions—questions as to genuineness and due execution, insofar as we could.

The plaintiff has exhibits 1, 2, 3, 4, and 5 heretofore offered. Do you have those, Mr. Clerk?

The Clerk: Yes, your Honor. Would you like to see them?

The Court: Yes, please. Does the plaintiff expect in the next trial to offer the same?

Mr. Lincoln: Yes, sir, I do. I surmise, however, that there will be objection to the admission of some of those photographs. Of course, that would be for your Honor's determination as to that.

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\* Page numbering appearing at top of page of Reporter's certified Transcript of Record.

The Court: Here is a circular: "Grand Canyon National Park of Arizona." It was marked Plaintiff's Exhibit 1 for identification in this last trial. Does the defendant admit the genuineness of this document?

Mr. Schell: Insofar as the genuineness is concerned, yes.

The Court: As having been issued by the defendant? [3]

Mr. Schell: I assume that is correct. I can't tell from here.

The Court: I will be glad to have you examine it. I think that we can dispose of these matters and it might save some time.

Mr. Schell: Yes. That is one issued by the defendant, but insofar as that being one issued, we won't question that. As to the materiality in this particular negligence case, that is something else.

The Court: Yes; I appreciate that. But, as I say, we are trying to resolve foundational questions. So, insofar as the genuineness of the document is concerned——

Mr. Schell: We won't question that.

The Court: ——the defendant offers to stipulate that the document was issued by the defendant.

Mr. Schell: So stipulated.

The Court: Do you accept that stipulation, Mr. Lincoln?

Mr. Lincoln: Yes, sir. Thank you.

The Court: Here is a circular which was Plaintiff's Exhibit 2 for identification at the preceding

trial: "Grand Canyon National Park," etc. Will it be stipulated, Mr. Schell, that that was issued by the defendant?

Mr. Schell: I will see if I can see the name on there. I can't seem to see anything on here as to who issued this thing, whether the Santa Fe Railroad or Fred Harvey. [4]

Mr. Lincoln: I might suggest, your Honor, that in that connection and with relation to this particular exhibit, we only are interested in it so far as the pictures themselves are concerned, to identify the pictures as being the Grand Canyon and the portion of the trail. And I think, as my memory serves me, those particular photographs which are a portion of this circular were identified as being those places by one of the witnesses at the former trial.

The Court: The photographs on the circular?

Mr. Lincoln: Yes, sir.

The Court: Plaintiff's Exhibit 2 for identification?

Mr. Lincoln: Yes, sir.

The Court: Correctly depict certain scenes?

Mr. Lincoln: We believe so; yes, sir. We are not concerned, your Honor, with the writing in the circular.

Mr. Schell: If it is just for the pictures, we will stipulate that they are pictures of what they purport to be.

Mr. Lincoln: That is all.



The Court: Scenes in Grand Canyon, and correctly depict what they purport to depict?

Mr. Schell: That is right.

The Court: As to time?

Mr. Schell: At or about this time.

The Court: At or about the time of the accident?

Mr. Lincoln: Yes, your Honor. [5]

The Court: And that Plaintiff's Exhibit 1 was issued and was in current circulation at or about the time of the accident?

Mr. Schell: I am so prepared to stipulate, because Mr. Lincoln said it came from there.

The Court: Very well. I had thought this pamphlet I have in my hand, apparently issued by the Department of the Interior, was Exhibit 3, but I do not see the marking.

The Clerk: Page 9.

Mr. Lincoln: In that regard, your Honor, there was just one page which we referred to there, which was a map of the locality, and that was the only portion of that circular which we introduced.

The Court: The clerk handed it to me with this page up and then I closed the pamphlet and lost the reference. Is there any stipulation you can make with respect to this? Does it purport to be a map of the south rim of the Grand Canyon?

Mr. Lincoln: That is supposed to be the El Tovar Hotel and its immediate surroundings.

The Court: Are you willing to stipulate that this map correctly depicts the relative locations of the various objects and buildings and the portions it depicts?

Mr. Schell: I assume so. May I just have a glance at it? Oh, I am willing to do so. I do not see it is material [6] one way or the other, but I am willing to stipulate.

The Court: Of course, we can't determine at this time as to the materiality of any of them.

Mr. Schell: I will stipulate it is a map of what it shows to be there, what it purports to show there.

The Court: And correctly depicts the relative locations of the various objects and buildings that it purports to depict?

Mr. Schell: Yes; so stipulated.

The Court: Do you accept that stipulation?

Mr. Lincoln: We will accept the stipulation, also.

The Court: Plaintiff's Exhibit 4 is a photograph with some people astride mules. Is there any stipulation that you gentlemen can make with respect to that?

Mr. Lincoln: I think we agreed, your Honor, at the trial that we had of this before that this was an actual photograph of the party in which the plaintiff was a member and was taken at the time of the trip which we are discussing.

The Court: What was the time of the trip?

Mr. Lincoln: July.

Mr. Schell: June, wasn't it?

Mr. Lincoln: June 17th.

The Court: 1942?

Mr. Schell: 1942.

Mr. Lincoln: 1942; yes, sir. [7]

Mr. Schell: Yes. This picture was taken at the head of the trail before they started down.

The Court: That was at the outset of the ride.

Mr. Schell: The outset of the ride, yes.

The Court: Do you have any other documents in evidence, Mr. Lincoln? Here are some X-rays.

Mr. Lincoln: I thought there was another circular here, your Honor.

The Court: Here is a bill, the clerk shows me, of Dr. T. E. Cox and of the Grand Canyon hospital, which are attached together and marked plaintiff's Exhibit 5. I suppose there will be testimony. Perhaps you can have a stipulation as to both Grand Canyon Hospital and the doctor. Is there any stipulation you can make with respect to these bills?

Mr. Schell: I do not believe we can at this time. I will get together with Mr. Lincoln and see if we can work them out, to minimize the trial, but I do not sufficiently remember those bills to say now.

The Court: I suppose you might be able to reach a stipulation that they were in fact incurred and in fact paid.

Mr. Lincoln: Yes. I think that was testified to by Mr. Mateas, that those were the bills which he received and which he paid at the time.

The Court: Mr. Clerk, will you mark the exhibits for identification which have been identified so far? Will it be [8] your practice to re-mark them again at the second trial?

The Clerk: No. I have numbered them 1 to 4, and those are the same numbers that they bore.

The Court: They carry the same numbers, but do you put another slip on them?

The Clerk: Yes, your Honor. I have done that.

The Court: Very well. These two statements, one of the hospital and one of a doctor bill, pinned together, Plaintiff's Exhibit 5 for the last trial, may be marked Plaintiff's Exhibit 5 for identification for the forthcoming trial.

One X-ray here is marked Plaintiff's Exhibit 6. The other X-rays are one other large one and four small ones.

Mr. Lincoln: I think they all came in as the one exhibit, your Honor.

The Court: As one exhibit.

Mr. Lincoln: And that was Dr. Sloan, as I remember.

The Clerk: I have my record from the last time. Six is an X-ray picture by Dr. Sloan; 7 is a bill of Dr. Sloan, and 6-A for identification were three X-ray pictures by Dr. Sloan.

The Court: These are the three. They do not seem to be marked three.

The Clerk: That is my record, your Honor.

The Court: There are three small ones and one large one. I assume there will be testimony as to these photographs? [9]

Mr. Lincoln: Yes, your Honor. We shall endeavor to have the person who took the X-rays here.

The Court: They may be marked in the respective numbers for identification at this time.

Mr. Lincoln: Yes, sir.



The Court: So that detail will be taken care of in the event of trial.

Mr. Lincoln: Yes, sir.

The Court: Then, here is a bill of Dr. Sloan's which is marked Plaintiff's Exhibit 7. I assume Dr. Sloan will testify?

Mr. Lincoln: I think so, sir, as far as I know now.

The Court: Is there any stipulation you wish to make with respect to that?

Mr. Schell: I do not see that there is anything we could stipulate to it at the moment.

The Court: The only thing I would suggest, possibly that the bill was incurred and was paid, if you are satisfied with those facts.

Mr. Schell: Is it marked "paid"?

The Court: No; it is not marked.

Mr. Schell: It is my recollection, probably in error, that it was not paid at the time of the last trial. Whether it has been paid since then I don't know.

The Court: Very well; it will be marked Plaintiff's [10] Exhibit 7 for identification for the forthcoming trial.

Are there any other documents that plaintiff proposes to use at the trial, Mr. Lincoln?

Mr. Lincoln: I am sorry, sir. There were two or three of these illustrated postal cards which I showed to counsel, but I am sorry I do not have them with me at the moment; and there was an additional circular which I thought was here, a circular which I have already exhibited to counsel,

both of which I would like to present. And Mr. Schell has some photographs which he would like to present, also, and we will stipulate that these were photographs taken on the trail. As to when or under what circumstances, of course, I think he should explain at the time of the trial.

Mr. Schell: Yes; we intend to.

The Court: All right. We have finished the plaintiff's exhibits, have we, now?

Mr. Lincoln: Yes, sir.

The Court: Now, Mr. Schell.

Mr. Schell: I have here seven photographs—I have another one, but that is a duplicate of one already in evidence. Four of these photographs show the mule “Chigger” with different people on board, so to speak.

The Court: Does the defendant have any exhibits which were introduced at the last trial?

Mr. Schell: No; there were not any because it was a [11] non-suit, you remember.

The Court: That is right.

Mr. Schell: So we never got to that point.

The Court: Very well; let us mark these for identification.

Mr. Schell: There were several more of that same type but I have not been able to locate them as yet.

The Court: Suppose you arrange these in the order in which you would like them to go in.

Mr. Lincoln: I don't think it makes any difference.

Mr. Schell: I don't think it makes any difference. I will just put them in this way: 1, 2, 3, 4.

The Clerk: A, B, C, D.

The Court: All right; they will be marked Defendants' A, B, C, and D. Those are various views of the mule in question.

Mr. Schell: That is right.

The Court: Do you stipulate that that is a fact?

Mr. Lincoln: I will stipulate that they are photographs. Of course, I do not recognize the mule. No, sir; I never saw it or him, whichever it is.

The Court: I assume there will be testimony on that.

Mr. Schell: Yes. There may be a couple more of those pictures.

Mr. Lincoln: That is all right. [12]

Mr. Schell: Then, here are some of the locus of the accident.

The Court: These depict the topography and general surface conditions along the trail at or about the point of the accident?

Mr. Schell: Yes. In other words, that is about the point where the plaintiff claims he involuntarily dismounted.

Mr. Lincoln: With the mule's assistance.

The Court: I do not suppose you recognize this scene?

Mr. Lincoln: No, sir; I do not. I am sorry. I never saw that, and I am afraid I would not recognize it, anyway.

The Court: Mr. Clerk, will you mark these three photographs as Defendants' exhibits next in order?

The Clerk: E, F, and G for identification.

The Court: E, F, and G purport to depict——

Mr. Schell: The locus.

The Court: ——of the scene were the accident occurred. Have you any others to offer, Mr. Schell?

Mr. Schell: No; nothing else, unless I will be able, before the trial, to find some more of the first type.

The Court: Yes. I do not mean to foreclose you. I would just like to get all of them marked as far as counsel can proceed respecting the trial.

The circular that is quoted from on page 3 of the stipulation, I assume is one of the circulars that has been [13] marked for identification.

Mr. Lincoln: I think not, sir. I have in mind that there was another circular which contained that phraseology, copy of which I showed to counsel during our discussions.

The Court: Apparently the caption is "Trail Trips into the Canyon."

Mr. Lincoln: Oh, yes; here it is.

The Court: I think the clerk might open that up for you.

Mr. Lincoln: Your Honor is quite right; it is in Exhibit A.

The Court: Exhibit 1, you mean, Plaintiff's Exhibit 1?

Mr. Lincoln: Exhibit 1, I should say; yes, sir.

The Court: Is there anything further that either of you gentlemen can suggest that we might dispose of today that will shorten the trial?



Mr. Schell: I can think of nothing further.

The Court: When would you like to try this case?

(Discussion as to time of trial omitted from transcript.)

The Court: Do you want to stipulate that the record made here this afternoon may be deemed a part of the record of the trial?

Mr. Lincoln: Yes; I think so.

The Court: Would you want to have the reporter write it up and file it to embody your stipulations? [14]

Mr. Lincoln: Yes, I think he should, your Honor.

Mr. Schell: All right; that is satisfactory.

The Court: Will it be stipulated that the cost of preparing the transcript will abide the event of the trial or be one of the costs of the trial?

Mr. Schell: Yes.

The Court: I would suggest that the reporter might hold it open and we will include whatever additional brief proceedings we may have, and then he can put it all in at the time of the trial. We might have a few more documents to mark and we can have them shown before the trial. I do not suppose there will be much additional.

Mr. Lincoln: I do not think so, do you?

The Court: Very well, then, it is stipulated by both of you that this may be a part of the record?

Mr. Lincoln: Yes, sir.

The Court: And that the cost of it will abide the event of the trial and it may be taxed as costs upon the conclusion of the trial.

Mr. Lincoln: So stipulated.

The Court: Is that your stipulation, Mr. Schell?

Mr. Lincoln: And that the present cost is to be shared by us equally.

The Court: Yes, sir. Is that so stipulated, Mr. Schell?

Mr. Schell: Yes, sir. [15]

Mr. Lincoln: Yes, sir.

The Court: Thank you, gentlemen. It will be April 29, at 10:00 o'clock, for further pre-trial.

(Whereupon, an adjournment was had until 10:00 o'clock a.m., Monday, April 29, 1946.)

\* \* \* \* \*

Mr. Lincoln: Plaintiff is ready, sir.

Mr. Schell: The defendant is ready.

The Court: Is it stipulated, gentlemen, that the jurors are all in their places?

Mr. Lincoln: Yes, sir.

Mr. Schell: So stipulated.

### EMMETT MYRON ENNIS

called as a witness by plaintiff, being first sworn, was examined and testified as follows:

The Clerk: Please state your name.

The Witness: Emmett Myron Ennis.

### Direct Examination

By Mr. Lincoln:

Q. Where do you live, Mr. Ennis?

A. Grand Canyon, Arizona; Grand Canyon National Park.

(Testimony of Emmett Myron Ennis.)

Q. And about how long have you lived there?

A. Well, I first went to work there in April, 1907.

Q. For whom did you go to work at that time?

A. Fred Harvey.

Q. And you are still working for the Harvey Company?

A. I am.

Q. Or Fred Harvey, whichever you may call it?

A. I am.

Q. In 1942 you were working for the Fred Harvey Company, were you?

A. I was.

Q. In what capacity, Mr. Ennis?

A. Assistant manager of the transportation department.

Q. Did that have to do with these mule trips down to the canyon? [33]

A. It does.

Q. During the time that you were working for the Fred Harvey Company did you go down the Bright Angel Trail to the Colorado River from time to time?

A. Oh, probably between 1500 and 2,000 times.

Q. How wide across is the Grand Canyon there at El Tovar?

A. 11 miles.

Q. And how deep is it from the rim to the Colorado River?

A. About 4,800 feet.

Q. How long is the Bright Angel Trail?

A. Eight miles.

Q. There is another trail, too, isn't there, called the "Kaibab"?

A. There is the Kiabab Trail; yes, sir.

Q. How do you spell that, please?

A. K-a-i-b-a-b.

(Testimony of Emmett Myron Ennis.)

Q. Thank you. And where is that trail situated with reference to the Bright Angel Trail?

A. Three miles and a half east.

Q. Also, of course, starting from the south rim, that is, this same rim that the Bright Angel Trail starts from, is that right? A. It does. [34]

Q. Is that a longer or a shorter trail to the river? A. It is a shorter trail to the river.

Q. And about how much shorter?

A. Seven and one-half miles from the rim to the ranch.

Q. On the south rim of the Canyon was there at that time a hotel? A. There was.

Q. What is the name of that hotel?

A. The El Tovar.

Q. About how old was the El Tovar?

A. Built in 1904.

Q. I show you some postal card pictures and ask you if you can tell me what those may be pictures of?

Mr. Schell: I have not seen those pictures, counsel.

Mr. Lincoln: I am sorry. I thought I showed those to you.

Mr. Schell: You showed me so many things.

The Court: Have those been marked for identification?

Mr. Lincoln: No, sir; these are new ones. I am sorry. I thought I showed you these.

Mr. Schell: They are pretty pictures. I can't quite see the materiality of them, if the Court



(Testimony of Emmett Myron Ennis.)

please, as to this particular case. I object to them on that ground. I can't see where it is material. I think there is a dining [35] room in the hotel and the lobby.

Mr. Lincoln: Well, we felt——

The Court: Is there a pending question?

Mr. Schell: Yes, if your Honor please.

The Court: Please read it, Mr. Reporter.

(Question read by the reporter.)

The Court: You may answer.

A. That is a picture of the El Tovar Hotel taken from the east side.

The Court: Does the card state that it is a picture of the El Tovar Hotel?

The Witness: Yes, sir.

The Court: Do you wish those marked?

Mr. Lincoln: Please. Thank you.

The Witness: This is the El Tovar Hotel taken from the west, looking east. This is a picture of the lobby of the El Tovar Hotel, and a picture of the dining room of the El Tovar Hotel.

The Court: Let them be marked in the order identified by the witness as Plaintiff's Exhibits 1-A, 1-B, 1-C, and 1-D. Are there four only?

Mr. Lincoln: Yes, sir.

The Court: For identification.

Mr. Lincoln: Sir?

The Court: They are marked for identification. You [36] have not offered them into evidence yet.

Mr. Lincoln: Oh. Well, I now offer them, sir.

(Testimony of Emmett Myron Ennis.)

Mr. Schell: There is an objection, your Honor. I do not see the materiality.

The Court: Objection overruled. They may be received into evidence.

Q. (By Mr. Lincoln): I show you a photograph, Mr. Ennis. Can you tell me whether or not that is a photograph of the Grand Canyon?

The Court: Has that been heretofore marked?

Mr. Lincoln: It has not; no, sir. None of these which I am about to present, your Honor, have been marked.

A. That is a photograph of the Grand Canyon.

The Court: Let it be marked Exhibit 1-E for identification.

Mr. Lincoln: We will offer this, sir.

The Court: Received into evidence.

The Clerk: So marked.

Q. (By Mr. Lincoln): I show you now, Mr. Ennis, a colored picture, a double-page picture, and ask you if that picture on the front and also the pictures which are on the back of that are any place which you recognize?

Mr. Schell: May we have those, Mr. Lincoln, as to when they were taken and where, possibly?

Mr. Lincoln: Well, I can best answer that, your Honor, [37] by saying that these pictures were taken by myself from the August number of "Arizona Highways," published in 1947, a magazine.

The Court: The material time in this case is what things looked like in June, 1942.

Mr. Lincoln: Yes, sir. I am going to ask him that.

(Testimony of Emmett Myron Ennis.)

The Court: I think you might as well ask him with respect to all of these.

A. Those are all pictures taken of Grand Canyon and different parts of it.

Q. (By Mr. Lincoln): Has the Grand Canyon changed in its aspect since 1942?

A. Not to the material eye.

The Court: Do all these pictures you have identified up to this point fairly represent the things purported to be shown as they existed in June of 1942?

The Witness: I don't think there is anybody could pick out any difference.

The Court: Do you offer that double-page picture?

Mr. Lincoln: We offer the double-page one; yes, sir.

The Court: Received into evidence, and it will be marked Exhibit 1-F.

The Clerk: Yes, your Honor.

Q. (By Mr. Lincoln): I show you another colored picture which has upon the front of it the designation "Arizona Highways," August, 1947, and ask you if that, [38] together with the picture on the opposite side of it, is one which you recognize as being any portion of the Canyon?

A. The one with the "Highways" magazine is a picture taken from the south rim; the one on the other side is a picture taken from the north rim.

Mr. Schell: I wonder if you could speak just a little louder, please, Mr. Ennis?

The Witness: Yes, sir.



(Testimony of Emmett Myron Ennis.)

The Court: Would you like that last answer read?

Mr. Schell: No; I got it, but with some difficulty.

The Court: Do you offer that?

Mr. Lincoln: We will offer this, sir.

The Court: Received into evidence.

The Clerk: 1-G.

Q. (By Mr. Lincoln): I show you another colored picture with two smaller pictures on the obverse of it. Will you tell me, please, if you recognize that also as being some portion of the Grand Canyon? A. They are.

Mr. Lincoln: We offer this one, sir, please.

The Court: Received into evidence.

The Clerk: 1-H.

Q. (By Mr. Lincoln): I have another colored picture with two smaller pictures on the back of that one. Do you also recognize that as a portion of the Canyon? [39]

A. I do.

Mr. Lincoln: We offer that one, sir.

The Court: Received into evidence.

The Clerk: 1-I.

Q. (By Mr. Lincoln): Mounted upon a piece of paper, Mr. Ennis, I show you four colored pictures. If you recognize those pictures as being any portion of the Canyon, will you tell us, please, what portion of the Canyon they represent?

A. The picture in the top left-hand corner is a picture of Ribbon Falls; the top right-hand picture



(Testimony of Emmett Myron Ennis.)

is a picture of Indian Gardens; the picture in the lower left-hand is a picture taken of the River, looking down the Canyon; and the other one is a picture of the Canyon, taken from a trail.

Mr. Lincoln: Thank you. We offer this, sir.

The Court: Received into evidence.

Mr. Schell: Is that also from that magazine article?

Mr. Lincoln: Yes.

The Clerk: Marked 1-J.

Q. (By Mr. Lincoln): In 1942, Mr. Ennis, were you familiar with the general floor plan of El Tovar, the hotel itself? A. I was.

Q. Going from the main entrance into the general [40] lobby and looking toward the left was there at that time a small room where they sold the tickets to various excursions?

A. Known as the transportation desk.

Q. Yes.

The Court: Please talk a little louder, Mr. Ennis.

The Witness: Yes, sir.

Q. (By Mr. Lincoln): "Known as the transportation desk," you said? A. Yes, sir.

Q. And at that place did they sell tickets for a mule ride down from the south rim to Phantom Ranch and back again? A. They did.

Q. Do you remember what the charge was for that? A. \$18.00.

Q. That included the stopover at Phantom Ranch, a stopover at night at Phantom Ranch, didn't it? A. That was all the expense.

(Testimony of Emmett Myron Ennis.)

Q. And they also crossed the Colorado River?

A. It did.

Q. By the way, how wide is the Colorado River at that point?      A. The bridge is 440 feet.

Q. From where did the mule trains, if I may use the expression—what did you call that excursion?

A. We called it the River Trip or the Phantom Ranch trip, either one. [41]

Q. From where did that river trip start?

A. The head of the Bright Angel Trail.

Q. In a corral there?

A. In a stone corral.

Q. I show you another colored picture—taken also, your Honor, from the same magazine. I might suggest that all the colored pictures which I present, except an ad, were taken from this same magazine, this same issue. Is that a picture of the corral that you just spoke of where they start from?

A. That is a picture of the loading corral at the head of Bright Angel Trail.

Q. And about as it was in 1942?

A. Just the same.

Mr. Lincoln: Thank you, sir. We will offer this, your Honor.

The Court: Received into evidence.

The Clerk: 1-K.

Q. (By Mr. Lincoln): How many people are there in a party or, shall we say, in a string? Is that the way you describe it?

A. In a string. Whatever there is to go up to 10 people.

(Testimony of Emmett Myron Ennis.)

Q. Not more than 10?

A. Not more than 10. [42]

Q. And does each one have a guide?

A. They do.

Q. Where is the guide with reference to the head or the tail of the string?

A. He always leads the party.

Q. So that none of the persons—I believe you call them “dudes,” don’t you?      A. Correct.

Q. That is, any person who is not the guide is a dude?      A. He is a dude.

Q. It doesn’t make any difference whether he is a cowboy or an employee of the Harvey Company or some stranger, is that right?

A. As long as he is not working for the transportation, he is a dude.

Q. I see. So that none of these dudes, then, would be able to get ahead of the guide, is that right?      A. That is right.

Q. And the guide keeps the pace so that none of them can go any faster?      A. That is right.

Q. But some of them do, I suppose, on occasions perhaps go a little slower. is that right?

A. That is right. [43]

Q. In which case what does the guide do?

A. Stops and waits until they catch up, and tries to get them to ride their mule up and keep up with the rest of the party.

Q. How wide is this Bright Angel Trail?

(Testimony of Emmett Myron Ennis.)

A. Oh, anywheres from four feet to 10 or 12 feet in places.

Q. That is where they have turn-outs, isn't it?

A. Not necessarily.

Q. But the great majority of the distance is about four or five feet wide, would you say?

A. About that; yes, sir.

Q. Now, these mules which you have there, who selects the mule originally? I mean by that who buys the mule originally?

A. Well, at that time the manager that was there ahead of me bought the mules, Mr. Shirley.

Q. Is he here today?

A. No. Mr. Shirley passed away.

Q. And after the mules were purchased what was done with them?

A. They was broke to pack and ride, and ride by the guides or packers.

Q. Tell us, please, Mr. Ennis, what you mean by "pack." [44]

A. Well, we have to pack all the stuff that goes into the Grand Canyon and to Phantom Ranch goes down on mules, hay, grain, food, everything goes down on mules. These mules are put in the pack train until they are gentle and can know how to handle themselves on the trail. Then the packers start in to ride them, then the guides ride them and eventually they get into the dude string.

Q. When do they get into the dude string?

A. Whenever the trail foreman satisfies himself that they are safe for dudes to ride.



(Testimony of Emmett Myron Ennis.)

Q. How long a period, that is, how long a period in time does it ordinarily take a mule from the time that he is purchased to the time that he is fit to go into the dude string?

A. That all depends on the mule. Anywheres from eight months to two years.

Q. The packing which you speak of is usually done on that other trail, the Kaibab Trail, isn't it?

A. Most of the time; not always. They are packed on both trails.

Q. Do you know this mule Chiggers?

A. I do.

Q. How long have you known it? I believe a mule is an "it," isn't it, neither a male nor a female?

A. Well, that all depends on the company we are in. [45]

Q. In any event, how long have you known this animal? We will call it that. A. Since 1938.

Q. That was when it was first purchased for the Harvey Company? A. That is right.

Q. Do you know what was done with the mule after that?

A. He went through the regular training period.

Q. Do you know that of your own knowledge or own memory of him? A. I do.

Q. How long had he been on the Bright Angel Trail carrying mules (dudes) up to June of 1942?

Mr. Schell: You mean "dudes."

The Witness: Carrying what?

(Testimony of Emmett Myron Ennis.)

Mr. Lincoln: I beg your pardon. I beg pardon. Carrying dudes, up until 1942?

A. He went on the dude trail, I believe, in 1940, that is, as a dude mule.

Q. Yes. Was he on there fairly constantly from that time on until 1942? A. He was.

Q. Wasn't there some time during which there were no excursions at all by reason of certain governmental regulations? [46]

A. The Government never regulated the mules.

Q. No. But didn't they regulate the excursions going up and down? A. No.

Q. You continued your excursions the entire time? A. All during the war.

Q. From 1940 to '42. One of those pictures, Mr. Ennis, you said was a picture of Indian Gardens. Where is Indian Gardens with reference to the Bright Angel Trail?

A. It is on the Bright Angel Trail.

Q. And about how far from the rim?

A. Four and one-half miles.

Q. That is, figuring the circuitous route?

A. That is right; that is the trail mileage.

Q. Not straight down, of course?

A. That is trail mileage.

Q. And it follows the contour of the hill or mountain, whatever it is there, doesn't it?

A. Well, it is shot out in the most feasible places.

(Testimony of Emmett Myron Ennis.)

Q. I am showing you a colored photograph, Mr. Ennis, and ask you whether or not that is a representation of any portion of the Bright Angel Trail as it was in 1942?

A. No; that is not the trail in 1942.

Q. I show you another one and ask you this same question with regard to that. [47]

A. That is Jacob's Ladder on the Bright Angel Trail.

Q. Is that as it was in 1942?

A. That is an old, old picture.

Q. I see. So that that does not represent it in '42?

A. No, sir.

Q. All right; we don't want it then. I show you now three photographs and ask you if any one of those represents the Bright Angel Trail as it existed in '42?

Mr. Schell: Just a moment. Is that part of the trail where this occurrence occurred, Mr. Lincoln, or just some part of the trail?

Mr. Lincoln: It is a part of the trail itself. Where this occurrence occurred.

Mr. Schell: If it is just some other part of the trail, we do not see the materiality of it, if the court please. Object to it on that ground. Pictures of the place where the accident occurred is one thing.

The Court: Overruled. You may answer.

A. Those pictures are taken of the Kaibab Trail.

Q. (By Mr. Lincoln): I show you another photograph which appears to be a photograph of a river. Do you recognize that one?

(Testimony of Emmett Myron Ennis.)

A. That is the river at the foot of the Bright Angel Trail. [48]

Mr. Lincoln: We will offer that picture, your Honor.

The Court: Received into evidence.

The Clerk: 1-L.

Q. (By Mr. Lincoln): I show you some other colored pictures and ask you if you recognize these—there are five of them—as being any portions of the Bright Angel Trail as it existed in 1942?

A. Those three are as the trail now exists.

The Court: Do they fairly depict those portions of the trail as they existed in June of 1942?

The Witness: Yes, sir.

Q. (By Mr. Lincoln): And the others do not?

A. No, sir.

Mr. Lincoln: May we offer these three, your Honor, in sequence?

The Court: Each shows a different portion of the trail, does it?

The Witness: That is right.

The Court: Are they otherwise identifiable in any way?

Mr. Lincoln: As to what portions, you mean, your Honor, or does your Honor mean whether they were taken from the same magazine?

The Court: So that we can identify them in the record to distinguish one from the other. [49]

Mr. Lincoln: Mr. Somers, your Honor, is going to mark each one by a different exhibit number.



(Testimony of Emmett Myron Ennis.)

The Court: Very well. The three last identified by the witness will be received into evidence and marked Exhibit 1——

The Clerk: 1-M, 1-N, and 1-O, your Honor.

The Court: We will take the morning recess at this time. You may step down, Mr. Ennis.

(The court admonished the jury and, as the jury was retiring from the courtroom, Juror Upson addressed the court privately.)

The Court: Did the reporter get that?

The Reporter: I could not hear it, your Honor.

The Court: If you want to ask that, Mr. Upson, you ask it after the recess.

Juror Upson: To whom do I ask it?

The Court: You ask the question you were going to ask now. You may ask that when the jury comes in after recess.

Juror Upson: And I address you?

The Court: Yes, sir.

Juror Upson: Thank you.

The Court: So all may hear. All members of the jury are entitled to hear all proceedings of the case.

Juror Upson: That is what I wanted to know. Thanks.

The Court: Recess for five minutes. [50]

(Short recess.)

(Testimony of Emmett Myron Ennis.)

The Court: Is it stipulated, gentlemen, that the jurors are all in their places?

Mr. Lincoln: Yes, sir.

Mr. Schell: So stipulated.

The Court: Proceed.

Q. (By Mr. Lincoln): Mr. Ennis, will you tell us a little about this Indian Gardens, that is, where it is and what it looks like?

A. Well, we call it halfway down the Bright Angel Trail to the river. There is a big bunch of Cottonwood trees there; there is a pump house where we pump our water from the Gardens back to the top of the hotel and all uses; stables there, hitch racks to tie the mules to. It is just a regular rest spot from going down and coming back.

Q. The dudes have a lunch down there, do they, in going down?

A. The river parties eat their lunches at the river; the Phantom Ranch parties eat theirs at Indian Gardens.

Q. But the river party, as you call it, that is the party which goes down——

A. It goes down and back the same day.

Q. They just stop there but do not eat, is that right?      A. No. [51]

Q. Are the mules watered there or do they eat there?      A. They are watered there.

Q. And that is all?      A. That is all.

Q. About how long a stop is usually made there?

A. Well, that all depends on the party and the conditions; in other words, from an hour to an hour and a half.

(Testimony of Emmett Myron Ennis.)

Q. I believe you said that you did know this particular mule Chiggers? A. I do.

Q. Have you ever ridden it yourself?

A. I have.

Q. Down the trail and back?

A. Down the trail and back.

Q. More than once? A. Several times.

Q. In the winter time are the mules still used on the trail or are they sent out to grass or to pasture?

A. We keep enough mules there in the winter time to take care of the winter business; the rest of the mules go to winter pasture.

Q. Do you know whether or not Chiggers was on winter pasture before this accident in '42?

A. He was. [52]

Q. How long had he been on the pasture?

A. Oh, I can't—well, probably went down in October and come back there around the middle of May.

Q. Was this the first trip which he had made this season? A. It was.

Q. We were speaking a little while ago about a place there in El Tovar in the hotel where they sold tickets for these trips. I show you what seems to be a circular and ask you if you remember whether or not this circular was being distributed at that excursion office, if I may use the term, during 1942?

Mr. Schell: Do you mean the transportation desk?

Mr. Lincoln: Yes. Thank you for the better designation, Mr. Schell.

A. Yes; it was.

(Testimony of Emmett Myron Ennis.)

Mr. Lincoln: We will offer that circular, your Honor.

The Court: Is that the circular heretofore marked an exhibit for identification?

Mr. Lincoln: Yes, sir. This was heretofore marked Exhibit No. 2, sir.

The Court: 2?

Mr. Lincoln: Yes, sir.

The Court: It will be received as Exhibit 2 into evidence. [53]

Q. (By Mr. Lincoln): I show you another paper which also seems to be a circular and ask you whether or not you recognize that as being a circular distributed by the transportation desk in the summer of 1942?

A. We kept those in the racks for everybody to help themselves.

Q. That is, they were distributed all over the hotel, is that right?

A. All over the Canyon.

Mr. Lincoln: All over the Canyon. We will offer this, your Honor. This has heretofore been marked Exhibit No. 1.

The Court: It will be received into evidence and marked Exhibit 1-P.

Mr. Schell: I did not hear that last number.

The Court: The next letter, Mr. Clerk?

The Clerk: 1-P.

The Court: The circular was heretofore marked on the pre-trial as Exhibit 1.

Mr. Lincoln: Your witness, Mr. Schell.



(Testimony of Emmett Myron Ennis.)

Cross-Examination

By Mr. Schell:

Q. Mr. Ennis, you have been working for Fred Harvey at the Canyon since 1907?

A. I started work for him the first time in April in 1907.

Q. And you have worked for him continuously since that time?

A. There was three different times I worked for him. I went to World War I and did not come back until April, 1921.

Q. When you first started working there what was the type of work you did?

A. I started in as a guide.

Q. And as such guide did you frequently go up and down that trail?

A. I did.

Q. Who maintains this Bright Angel Trail?

A. It is maintained by the U. S. Government, the National Park Service, Department of the Interior.

Q. Do you or does the Government have men stationed there near the Bright Angel Trail?

A. They have men practically every day that drops over there; they are rangers; at the starting time of the trail trips.

Q. Do your trail trips work under the supervision of these rangers?

Mr. Lincoln: Objected to as calling for a conclusion of the witness and entirely immaterial.

The Court: Sustained in that form. [55]

(Testimony of Emmett Myron Ennis.)

Q. (By Mr. Schell): Does the Government, the Park Service, maintain a camp in the general vicinity of the El Tovar Hotel?

Mr. Lincoln: Objected to as being immaterial.

The Court: Overruled.

Mr. Lincoln: Not proper cross-examination.

The Court: Overruled. He may answer.

A. They do.

Q. (By Mr. Schell): And where is that located?

A. It is southwest—or southeast of the head of the trail.

Q. How many men do they keep around there, approximately?

A. It would be just an estimate.

Q. Well, give us your best estimate.

A. Oh, I would say the Park Service has in the neighborhood of 75 employees the year 'round.

Q. When these trail trips start out what is the custom there with reference to the Government men being present or otherwise?

Mr. Lincoln: Object to that—just a minute, please, Mr. Ennis. We will object to that as being entirely immaterial, not proper cross-examination. I respectfully submit, your Honor, we are not criticizing the Federal Government; we are not criticizing anybody but the Harvey [56] Company.

The Court: What would be the purpose of it, Mr. Schell?

Mr. Schell: Just to show that the general thing is supervised by the Government and they approve of the methods used in the handling.

(Testimony of Emmett Myron Ennis.)

The Court: Is there any contention here that the Government had anything to do with these trips?

Mr. Schell: No. Not to that effect, no; just that the Government supervises the operation, as in the National Parks, checks them and sees that they are conducted in accordance with Government standards.

The Court: Is there any contention that any agency of the Government had anything to do with these mules or this trip?

Mr. Schell: I do not think this particular trip, except they do check to see what is the training of the mules, etc.

The Court: Sustained.

Q. (By Mr. Schell): The Bright Angel Trail referred to, is that the same as it was when you first came there or has it changed?

A. It has changed.

Q. And changed before 1942? A. It was.

Q. And Indian Gardens, you say, is approximately half [57] way to the river?

A. Approximately.

Q. Where did this particular trip, this Phantom Ranch trip, go? Just tell us after it gets down to the river, what does it do?

A. It goes up what is known as the river trail which intersects the Kaibab Trail, crosses the Kaibab bridge on over to the banks of Bright Angel Creek and up to the ranch.

Q. With reference to the training of the mules, is that under your supervision generally?

(Testimony of Emmett Myron Ennis.)

A. Generally, yes; but it is directly under the trail foreman, which is my assistant or general foreman.

Q. Just a little louder, please.

A. Generally under me, but the direct training comes under the trail foreman, one of my assistants who is directly responsible for the mules.

Q. During the summer approximately how many trips do you make down during the months, say, June, July, and August, per day down that trail?

A. You mean how many people do we take down?

Q. Yes.

A. Well, that varies. Anywheres from 50 up to 80.

Q. You say that the mules are first started in on packing. Will you explain just what course the mules are put through in training? [58]

A. Well, when the mules are first brought to the Canyon they are broke to ride, and then they have pack saddles put on them. We tie canvas on each side, tie an old automobile tire on the side, something that will flop around, and then let them run and kick until they get tired of it, until they get used to that stuff hanging there. We hang everything in the world that we can find on there that would scare a mule until he gets used to having them. Then he is taken out to the pack train, and the first few trips the mule is soft and he goes down the trail light, just the saddles on, and then they put a little load on him. Finally, they get him hard-



(Testimony of Emmett Myron Ennis.)

ened in and gentled down to where they can put the usual 150 pounds on the mule and go down and back. And the guides that is with the pack train, at that time they start in as quick as the mule begins to gentle real gentle, they will ride one mule down to the ranch under pack and then he will saddle up another mule and ride him back. Sometimes they will ride two mules on the way back, change. So finally, the packer decides that the mule is gentle enough for a guide to ride. He is brought to town and he rides him in and out of the Canyon trail until the guide decides that the mule is gentle enough for dudes. He tells Mr. Bradley. Mr. Bradley will watch the mule a few days, maybe ride him himself, make a trip on him, and he will decide that the mule has got gentle enough to carry [59] dudes, and then he will put a dude on him. And they always put him next to the guide and the guide will watch him a day or two, and finally he just works right in.

Q. This particular mule Chiggers, you say you have known him since '38, when he came to the Canyon. Is the mule still Chiggers?

A. He is.

Q. Do you still use him?

Mr. Lincoln: Objected to as immaterial.

A. Still in use.

The Court: Sustained.

Mr. Lincoln: May the answer go out, please?

The Court: The answer is stricken.

Mr. Lincoln: And the jury instructed not to consider it.

(Testimony of Emmett Myron Ennis.)

The Court: The jury is instructed to disregard the testimony at present. The issue is in 1942.

Q. (By Mr. Schell): Do you know what the mule did in 1938 and '39?

A. In 1938 and '39 he was on the pack train.

Q. Did he ever go into the dude string?

A. He went into the dude string in '40.

Q. Did he work in the dude string in 1940 and '41? A. He did.

Q. What did you observe about this particular mule Chiggers? [60]

A. Well, my attention was called to Chiggers by the packers when he first come out there. The packer was bragging about what a gentle mule he was and what a pet he was making.

Mr. Lincoln: We ask that the remarks of the packer to this witness be stricken out as being hearsay.

The Court: Motion denied.

Q. (By Mr. Schell): Then did you have occasion to ride him?

A. I think I rode him the first time in '40 to the Phantom Ranch on a fishing trip.

Q. And what did you observe about the mule?

A. He was a very gentle mule. You could get off of him any place on the trail and, without a rope, he would follow you, or you could drop it and he would stand.

Q. Did you see the mule from time to time, then, after 1940 and '41?

A. Every few days, whenever I happened to be around the barns or over to the corrals.

(Testimony of Emmett Myron Ennis.)

Q. Did you ever see the mule do anything out of the ordinary during all that time?

A. I never did.

Mr. Lincoln: We certainly will object to this line as immaterial. So far as that phase of it is concerned, I would like to be heard on the question, perhaps properly [61] without presenting such thoughts as I have on that matter before the jury.

The Court: The answer is in.

Mr. Lincoln: Pardon me, sir. I did not understand the answer was in. If it is in, may it be stricken out for the purpose of attacking it by my objection?

The Court: Yes; the answer may go out for that purpose. Will you read the question, Mr. Reporter?

(Question read by the reporter.)

The Court: Your objection?

Mr. Lincoln: We object to it as being entirely immaterial. Our position with relation to that, your Honor, is that it does not make a bit of difference if a man drives an automobile for years and years, but yesterday he was in an accident.

The Court: Objection overruled. The answer may stand.

Mr. Lincoln: Was there an answer there, Mr. Reporter?

(Answer read by the reporter.)

Mr. Lincoln: Thank you.

Q. (By Mr. Schell): So far as your observations of the mule are concerned from the time you



(Testimony of Emmett Myron Ennis.)

first observed him up until—well, June 17, 1942, what did you observe with reference to the conduct of the mule?

A. He proved himself to be a very kind, level-headed, quiet mule. [62]

Q. With reference to the training of mules generally, have you always worked in the transportation department during the time that you were with Fred Harvey? A. I have.

Q. Have you had occasion to observe mules, say, that have been worked and then are put to pasture and then reworked again? A. Every year.

Q. What has been your observation, if anything, whether or not there is a difference with mules after they have been to pasture from what they have been before?

Mr. Lincoln: Objected to as incompetent, irrelevant and immaterial.

The Court: Overruled.

A. Any mule that is trained on that trail, he doesn't forget his training. He comes back to the Canyon there in the spring of the year and he is shod, and he runs on pasture all winter without shoes. The first thing that is done is shod, and then he is put on a two-day trip, which is an easy trip. The mule is too soft to make the round trip up and down the Canyon in one day; so he is put on the two-day trip, and that is the way they are hardened up to the trail.



(Testimony of Emmett Myron Ennis.)

Q. Did you ever find them unmanagable or anything after they have been on pasture? [63]

A. Never.

Q. Are you familiar, Mr. Ennis, with the equipment that is on these mules or was on them—I am referring in all my questions to 1942?

A. I am.

Q. What does the dude mule have?

A. He has the saddle blanket, cinches, bridle, halter and rope.

Q. Does this bridle have reins on it?

A. It does.

Q. On all of them?           A. On all of them.

Q. What is the purpose of those reins?

A. They are for the rider to help the mule and control the mule. All riders—when the man that mounts them, is told to put them on a mule and they fit their stirrups to them the right length, and tell them, now, not to get off that mule until the guide gets there, to stay on, to hold the reins in their hands at all times, and every rider is instructed that way, to please observe what they are told by their guide.

Mr. Lincoln: We ask that the testimony of this witness with relation to what every person is told be stricken out as being hearsay and also not responsive to the original question. [64]

The Court: Motion denied.

Mr. Schell: That is all at this time.

(Testimony of Emmett Myron Ennis.)

Redirect Examination

By Mr. Lincoln:

Q. Mr. Ennis, really, when you come to consider this mule Chiggers he was a sweet, kindly, gentle little fellow, wasn't he? A. He was.

Q. How much did he weigh?

A. Around 900.

Q. How do you distinguish as to which person shall ride which mule?

A. That all depends on the trail foreman and the guides, and the weight of the people and the load that the mule carries.

Q. Do you put the smaller person on a smaller mule and the larger person on a larger mule?

A. Not always.

Q. What makes the distinction?

A. Some large mules doesn't handle as big a load as a small mule.

Q. How did this Chiggers operate in that regard; did he handle a large load?

A. He will handle a pretty good load when he is [65] hardened up.

Q. Do you call him a large mule or a small mule?

A. He is a small mule.

Q. Had he been somewhat a sort of a pet among your people there? A. He was.

Q. How would you describe his actions before this day in June that we are supposed to have the difficulty with him?

A. Well, I don't quite get your question.

(Testimony of Emmett Myron Ennis.)

Q. Well, you say he was a pet. What did you do to make him a pet?

A. Well, you don't do anything. The mules is that way; they are just naturally a pet.

Q. Just naturally his particular disposition, is that right?      A. That is right.

Q. Mules have different dispositions as much as people, I suppose, don't they?

A. Just the same.

Mr. Lincoln: I think that is all.

Mr. Schell: There is one other question, if I may, please. [66]

Recross-Examination

By Mr. Schell:

Q. Do you know of your own knowledge whether or not women and children had ridden Chiggers?

A. They had.

Q. Down the Canyon?      A. Yes, sir.

Q. Did you ever have any trouble with him at all?      A. No, sir.

Mr. Lincoln: Wait a minute. We certainly object to that.

The Court: Sustained in that form.

Mr. Schell: That is all at this time.

Mr. Lincoln: If that answer went in, your Honor, may it be stricken out and the jury instructed to to disregard it?

The Court: The answer is stricken and the jury is instructed to disregard it. You may put the question with respect to some definite time.

(Testimony of Emmett Myron Ennis.)

Q. (By Mr. Schell): Prior to June 17, 1942, did you ever have any difficulty with the mule?

A. We never did.

Mr. Lincoln: The same objection.

The Court: The objection may be deemed made and the answer will stand.

Mr. Upson, you had a question? [67]

Juror Upson: The question has been asked by the testimony.

The Court: You had a question to ask the court.

Juror Upson: The question I had to ask has been answered by this testimony.

The Court: Did you desire to ask the court?

Juror Upson: No; I do not need to. It has been answered by this question.

The Court: Any of the jurors have any questions to ask Mr. Ennis?

Juror Dorr: I would like to ask him one, your Honor. In the operation of this Chiggers——

The Court: You are Mr.——

Juror Dorr: Mr. Dorr.

The Court: Oh, yes, Mr. Dorr.

Juror Dorr: In the operation of Chiggers in this string had he previously been back in the string as No. 7?

The Witness: Well, more than likely he was, yes; because they don't have no specific place to put a mule at in the string. When the string is made up, the dudes go into the Canyon and ladies is all put next to the guide, and then the men bring up the rear. That is to give the guide a better chance to watch the women, because it is naturally



(Testimony of Emmett Myron Ennis.)

assumed that the women is more apt to get scared or have a faint spell when they come to these steep places than men [68] is, and they are put up there so the guide can get to them quicker.

Juror Dorr: Had he at times headed the string or been up close to the foot of the string?

The Witness: Oh, yes; he had headed the string when the packers or guides was riding him.

The Court: Any other questions? You may step down.

Mr. Lincoln: May I have one question further, your Honor?

Q. Do you know, Mr. Ennis, of your own personal knowledge whether Chiggers had ever been the last in the string before? I mean by that, had you ever seen him as the last one in the string?

A. I haven't.

Mr. Lincoln: That is all.

The Court: You may step down, Mr. Ennis.

Mr. Lincoln: Mr. Mateas, please.

### ELMER H. MATEAS

the plaintiff herein, called as a witness in his own behalf, being first sworn, was examined and testified as follows:

The Clerk: Please state your name.

The Witness: Elmer Mateas. [69]

### Direct Examination

By Mr. Lincoln:

Mr. Mateas, your Honor, is quite deaf and uses one of these deaf person's apparatus; so it may be

(Testimony of Elmer H. Mateas.)

necessary for me, if I may be permitted, to approach nearer to him in order that he may hear me.

Q. Can you hear me from here?

A. I can hear you but not too well. That is, I can hear you and I may misunderstand your question or something.

The Court: Do you hear normally with the hearing aid you are wearing?

The Witness: Yes, sir.

The Court: I would suggest you stand back there at the lectern, Mr. Lincoln. And if you do not understand the question, say so.

The Witness: Yes, sir.

The Court: And he will repeat it.

Mr. Lincoln: I will try to talk louder.

Q. Mr. Mateas, how old were you in 1942?

A. 31.

Q. And up to that time what had been your business?

A. I was a contractor.

The Court: Can you speak louder?

A. I was a lath and plaster contractor.

Mr. Lincoln: May I ask the jurors, your Honor, if he [70] spoke loud enough so that numbers 1 and 7 may hear him?

A Juror: A little louder.

Mr. Lincoln: Juror No. 1 and other jurors say, Mr. Mateas, that they can't hear you, especially these at the end of the jury box. Will you talk louder, please, and talk so that I can hear you over here, please?

(Testimony of Elmer H. Mateas.)

The Court: You said your business had been plastering contractor?

The Witness: Plastering contractor; yes, sir.

The Court: Keep your voice up so all of us can hear you.

The Witness: In 1941 I was a plastering contractor. Is that better?

Q. (By Mr. Lincoln): Before 1942 had you ever been to the Grand Canyon?

A. I had been to the Grand Canyon.

Q. And what year was it that you went there first? A. 1941.

Q. At that time did you take a mule ride down the Canyon? A. No, sir.

Q. Did anybody accompany you in 1941?

A. 1941?

Q. Was anybody with you in 1941?

A. My wife. [71]

Q. This lady who sits here? A. Yes, sir.

Q. In the front row? A. Yes, sir.

Q. And in 1942 was anybody with you?

A. My wife, again.

Q. From where did you come to go to the Canyon in 1942?

A. I did not understand that question.

Q. Where did you live in 1942?

A. In El Monte.

Q. And how did you get to the Canyon from there? A. We drove in our own car.

The Court: Can you hear, Mrs. Anderson?

Juror Anderson: Not too well.

(Testimony of Elmer H. Mateas.)

The Court: Suppose you face the jury as much as you can and speak louder.

Mr. Lincoln: May I stand over here, your Honor, and perhaps I can get the voice thrown in this direction more.

The Court: Where you are standing now will be satisfactory.

Mr. Lincoln: Thank you.

Q. You say you went there in your car?

A. Yes, sir.

Q. Who drove the car all the way? [72]

A. I did.

Q. Do you remember what day you arrived at Grand Canyon in 1942?

A. We arrived on Tuesday.

Q. Pardon? A. Tuesday.

Q. What day of the month was that?

A. June 16th.

The Court: June 16th?

The Witness: June 16th.

Q. (By Mr. Lincoln): What time of the day did you arrive on the 16th?

A. Some time in the evening, about 4:00 or 5:00 o'clock.

Q. You and your wife, did you remain over night at the Canyon at the El Tovar?

A. No; we were not at the hotel. We were in one of these—oh, like an auto court.

Q. Like an auto court? A. Yes, sir.

Q. Did you go to the hotel that evening?

A. Yes, sir.



(Testimony of Elmer H. Mateas.)

Q. And did you go to what is called the transportation bureau?      A. Yes, sir. [73]

Q. Calling your attention to Plaintiff's Exhibit No. 2, that being a circular which has been identified by Mr. Ennis, did you see that circular at that time?      A. Yes, sir.

Q. Is that the original circular which you procured at that time?

A. Well, I don't know whether it was the same one or not, but it was identical to it.

Q. I also show you a circular which has been marked No. 1-P in evidence, and ask you whether or not you saw that circular?      A. Yes, sir.

Q. At that time, or one like it?

A. Yes, sir.

Q. Do you know whether or not you read the circular which you now have in your hand, No. 1-P?

A. Yes, sir.

Q. At that time?

A. I read all the circulars.

Q. Now I call your attention to a particular clause in this circular headed "Trail Trips Into the Canyon."

"To be fully appreciated, the Grand Canyon must be seen from both top and bottom—from the inside as well as from the outside. For exploring the inner recesses of the chasm, several safely constructed [74] trails have been built by government engineers.

"Although visitors may venture short distances down these trails on foot, the accepted

(Testimony of Elmer H. Mateas.)

mode of travel for longer journeys is via the famous 'Grand Canyon Mules.' These faithful, sure-footed animals, in charge of experienced guides, hold a thirty years' record of carrying many thousands of inexperienced riders down the trails and back in perfect safety."

Did you read those clauses which I have just read to you?

A. Yes, sir; I read it myself. It was pointed out to me.

Mr. Schell: I beg pardon. I did not hear the answer.

Mr. Lincoln: I did not, either.

The Court: Please read it, Mr. Reporter.

(Answer read by the reporter.)

Q. (By Mr. Lincoln): When you went to this transportation bureau was anybody with you?

A. My wife.

Q. Did you have any talk there?

A. I did.

Q. With the man in charge of the bureau?

A. Yes, sir.

Q. Was that talk in relation to the trip down the Canyon? [75]

A. Yes, sir.

Q. What, if anything, did you tell him?

A. I told him I was not experienced in riding either horses or mules.

Q. That you were not an experienced rider?

A. That I was not an experienced rider; yes, sir.

Q. As a matter of fact had you ever ridden on a horse in your life?

A. No, sir.

(Testimony of Elmer H. Mateas.)

Q. Or a mule? A. No, sir.

Q. Up to that time? A. No, sir.

Q. Did you tell this guide, this bureau attendant that? A. I told him that.

Mr. Schell: Just a moment. We object to these questions as leading and suggestive.

The Court: I suggest you frame them differently, Mr. Lincoln.

Q. (By Mr. Lincoln): What, if anything, did the attendant say to you in return?

A. I do not quite get that question.

Q. What answer did he make to you?

A. He told me that probably 75 per cent of the [76] people had never been on a horse or a mule before until they had made the trip.

Q. Did you believe him? A. Yes, sir.

Q. When you read this circular did you believe that? A. Yes, sir.

Q. Did you buy a ticket based upon your belief?

A. I did.

Q. And did you pay for the ticket?

A. Paid for it. I had two tickets.

Q. Two tickets. When was the trip that you were to take on these tickets?

A. 11:00 o'clock the next morning.

Q. The next morning? A. Yes, sir.

Q. And at 11:00 o'clock the next morning where were you?

A. We was at the corral at the head of the trail.

Q. Was that the corral which had the stone fence around it? A. Yes, sir.

(Testimony of Elmer H. Mateas.)

Q. And when you got to the corral, what did you see?

A. Well, there was a lot of mules in there and other people around.

Q. A lot of mules and other people around? [77]

A. Right.

Q. Right.

A. A lot of mules, also other people, mules and people.

Q. Mules and people. Did you notice any other party? By that I mean an entire string of persons who were about to leave?

A. There was a party already there when we arrived.

Q. And did it go before you left?

A. They left ahead of us.

Q. Did you notice how many persons were in that party?

A. It is kind of hard to say, because our party was starting to arrive as that party was ready to leave. It would be hard to tell.

Q. How many persons were there in your party altogether, counting the guide?

A. There was six besides myself; that is seven total.

Q. Seven, and then the guide besides, is that right?

A. No, sir; seven including the guide.

Q. Seven including the guide?

A. Yes, sir.

Q. Did you notice any other persons in your party getting on the mules?



(Testimony of Elmer H. Mateas.)

A. I noticed they were all mounting approximately one after the other. [78]

Q. Did you get onto the one mule yourself?

A. No, sir. The mule was picked out for me.

Q. There was a mule picked out for you?

A. The mule was picked out for me.

Q. How was it picked out?

A. Well, the trail master——

Q. And a little louder, Mr. Mateas, too, please.

A. The trail master would just eye up the people in the party and pick out a certain person and put him on a particular mule.

Mr. Lincoln: Mr. Reporter, will you please repeat that answer?

(Answer read by the reporter.)

Q. How did he do that to you? What did he do or what did he say to you?

A. Oh, he just looked around and said, "You take this one," and he gave me a particular mule, and that was that.

Q. Do you see the trail master anywhere in the courtroom? A. Yes, sir.

Q. Do you remember what his name was?

A. Mr. Bradley.

Mr. Lincoln: May we ask, your Honor, that Mr. Bradley stand up? [79]

(A gentleman standing.)

Mr. Lincoln: Thank you.

Q. That is the gentleman that has just stood up, is it? A. Yes, sir.

(Testimony of Elmer H. Mateas.)

Q. Where were you in the string, which number in the string?      A. I was on the end.

Q. The last one of the string?

A. The last one.

Q. Was anything said to you with relation to the reins of the mule?

A. Yes, sir; I was told to hold the reins in my hands at all times.

Q. What was the cause of that?

Mr. Schell: Just a moment. That is objected to as calling for conclusion and speculation.

Mr. Lincoln: That may be withdrawn. You are quite right. It may be withdrawn.

Q. Did you observe that the other members of the party were holding their reins in any manner different from what you were?

Mr. Schell: That is objected to as immaterial.

A. Some of them did not hold their reins.

Mr. Lincoln: Wait a minute. [80]

The Court: Did you say "all other members of the party?"

Mr. Lincoln: Some of the members of the party, sir, I may have said "all," but if I did, I did not intend it.

The Court: "Were holding their reins in a different manner?"

Mr. Lincoln: Yes, sir.

The Court: How would that be material?

Mr. Lincoln: Well, if your Honor would permit that question, I think your Honor will observe or will see its materiality. I would rather not sug-

(Testimony of Elmer H. Mateas.)

gest for the moment, because I think it would not be fair to the witness nor to the jury.

The Court: Sustained in that form. You may rephrase it.

Q. (By Mr. Lincoln): Did you see other members—— A. Yes, sir.

Q. ——of your party hold their reins in a manner different from what you were holding yours?

A. Some of them were not holding them——

Mr. Schell: Objection; the same question.

The Court: Sustained in that form.

Mr. Schell: I move that answer go out.

The Court: The answer is stricken and the jury is instructed to disregard it. [81]

Q. (By Mr. Lincoln): Did you have any conversation with the trail master regarding the manner in which you should hold your reins?

Mr. Schell: Objected to as already asked and answered, and conversation given.

The Court: Overruled.

Mr. Lincoln: Just answer that yes or no, please.

A. Not exactly conversation; no, sir.

Q. What?

A. He told me to hold my reins or let mine lay idle like some members had been doing and put a twist on the saddle horn; and I did the same and I was told to hold the reins at all times. There wasn't any conversation concerning it.

The Court: Read the answer. Suppose you speak up, Mr. Mateas.

The Witness: Yes, sir.

(Testimony of Elmer H. Mateas.)

The Court: Talk to the back of the room back there as best you can.

(Answer read by the reporter.)

Mr. Schell: Stipulate that picture may go in and produce Chiggers to the court and jury at this time.

Mr. Lincoln: Yes, sir; this was marked Exhibit 4. May we then also stipulate, your Honor, that this is a photograph of the party on which Mr. Mateas was one of the [82] riders, taken on that June 17, 1942, just at the beginning of the excursion?

Mr. Schell: So stipulated.

The Court: Very well. Do you offer it in evidence?

Mr. Lincoln: We will offer this; yes, sir.

Q. Do you know the names of the persons who were in your party?      A. Yes, sir.

The Court: Just a moment, and we will have it marked.

Mr. Lincoln: Pardon, sir.

The Clerk: 4 in evidence.

The Court: Please read the question to the witness, Mr. Reporter.

(Question and answer read by the reporter.)

Q. (By Mr. Lincoln): Showing you this picture, Mr. Mateas, can you tell me the names of those different persons, beginning with the guide? Is the guide the one in the extreme front there?

A. The guide is the one on the lower part of the picture.



(Testimony of Elmer H. Mateas.)

Q. That would be the front of the picture?

A. Yes, sir.

Q. Who is the one at the very end there, the last in the string?      A. I am the one on the end.

Q. And then immediately below you is another man's face. Do you know who that is?

A. Yes, sir; Mr. Boles.

Mr. Lincoln: B-o-l-e-s, Mr. Reporter.

Q. And below Mr. Boles is a lady. Do you know who she was?      A. That is Mrs. Vogel.

Q. V-o-g-e-l. And below her, again, is another lady.      A. That is my wife, my wife.

Q. That is Mrs. Mateas?      A. Mrs. Mateas.

Q. Below Mrs. Mateas, again, is another lady.

A. Mrs. Rayle—no; that is Mrs. Boles.

Q. Mrs. Boles. And then the last lady was named who?      A. Mrs. Rayles or Rayle.

Q. Rayle, R-a-y-l-e?      A. I believe so.

Mr. Lincoln: I observe, your Honor, that it is 12:00. Does the court care to suspend at this time?

The Court: Yes; we will take the noon recess at this time. You may step down, Mr. Mateas.

Is there any objection to resuming at 1:30?

We will recess at this time until 1:30 this afternoon.

(The court admonished the jury.) [84]

You are now excused until 1:30 this afternoon.

(The jury retire from the courtroom.)

The Court: Is it stipulated, gentlemen, that the jury has left the room?

Mr. Schell: Yes; so stipulated.

Mr. Lincoln: Yes, your Honor.

The Court: Mr. Lincoln, you were asking two questions to which I sustained the objection. You asked if there was any difference in the manner in which they were holding their reins. I sustained an objection upon the form, because some person might be holding the reins up like this, and somebody like this, and someone over here like that.

Mr. Lincoln: I see your Honor's point.

The Court: If you have a question to bring out, something that should have been obvious to anyone present, that is, that some people were holding their reins and some were not——

Mr. Lincoln: Yes, sir.

The Court: ——as I understood in your opening statement that you intended to prove, that would be a different matter.

Mr. Lincoln: Thank you for the thought, your Honor.

(Further discussion of court and counsel as to the order of proof omitted from transcript.)

The Court: The case is recessed until 1:30 [85]

(Whereupon, a recess was taken until 1:30 o'clock p.m. of the same day, Tuesday, September 30, 1947.) [86]

Los Angeles, California,

Tuesday, September 30, 1947, 1:30 P.M.

ELMER H. MATEAS

recalled.

Direct Examination  
(Resumed)

The Court: Is it stipulated, gentlemen, that the jurors are all in their places?

Mr. Lincoln: Yes, sir.

Mr. Schell: So stipulated.

The Court: Proceed.

Mr. Lincoln: I understand, your Honor, that I would not be precluded from asking questions with reference to the position of the reins, provided, however, my questions are properly framed, sir.

The Court: Put your questions, Mr. Lincoln. Put your question, Mr. Lincoln.

Mr. Lincoln: Thank you.

Q. Mr. Mateas, as your party was just about to start where were your reins with reference to the mule?

A. They were lying idle on the mule's neck with a loop around the horn.

Q. Did you observe where the reins were with relation to the mules of any other members of the party?

Mr. Schell: That is objected to as incompetent, irrelevant and immaterial. [87]

The Court: Overruled.

(Testimony of Elmer H. Mateas.)

A. May I answer that? Not to all of them, but there were some ones were in the same way; they were lying loose and may or may not have been tied to the horn.

Q. (By Mr. Lincoln): At that time did you have any talk with the trail master with reference to that position of your reins?

A. He came over and told me to hold the reins in my hands at all times.

Q. And did you do that?           A. Yes, sir.

Q. Just as you were about to start out of the corral where was the mule that your wife was on with reference to you?

A. She was in the same position it shows in the picture, of roughly half way, a little toward the front.

Q. And did you have any talk with the trail master then with reference to your position in the string?

A. Yes, sir. I wanted to bring my mule in line behind my wife and he pulled me back out of line; and I requested him not to ride there, because I wished to be alongside or behind my wife or close to her, and I am not sure what he said, but he would not let me do it. He pulled me back out of the string.

Q. As you went along down the trail what, if anything, [88] did your mule do rather than walk along behind the rest of them?



(Testimony of Elmer H. Mateas.)

A. Well, at frequent intervals he would break into a faster trot or whatever the particular speed was, and try to squeeze through the preceding mules.

Q. Was that on the side of the mountain or on the side where the abyss was?

A. Well, he did it several times on the way down and it would be sometimes on one side and sometimes on the other.

Q. Do you remember who was ahead of you on the immediate mule?

A. Mr. Boles was ahead of me.

Q. As your mule would act in that way from time to time did Mr. Boles do anything?

A. He was always wanting to grab my mule by, I believe it is called the halter or a head strap on the mule. He would grab the mule and hold it back.

Q. How many times would you say, roughly—perhaps you can't give the exact number—but about how many times would you estimate that the mule acted in this manner before you arrived at Indian Gardens?

A. Oh, I would say it was six, maybe eight.

Q. When you arrived at Indian Gardens did all the people dismount? [89]

A. At Indian Gardens, yes, sir; everybody dismounted.

Q. And about how long a rest did you have before they began to mount again?

A. I would say about an hour.

Q. During that time you had lunch, did you?

A. Yes, sir.

(Testimony of Elmer H. Mateas.)

Q. Did you notice whether the mules had anything to eat or to drink?

A. No, sir; not at that time. They didn't eat at all and they didn't drink until they left again.

Q. Just as they were about to leave they drank, was that it?

A. After they were mounted, they stopped in at the water trough before they went on down the trail.

Q. As the people began to mount, just before they started out again from Indian Gardens, was anybody else on your mule?

A. Mr. Boles was on my mule.

Q. And did you observe what the guide Bob Ennis was doing at that time?

A. He was starting from the front of the line, and the ladies were all in front, and he was going down to each mule, helping the ladies to mount.

Q. What mule, if any, did you get on?

A. Mr. Boles was on my mule. I took the next mule [90] in line, the only empty mule left. It turned out to be his.

Q. That was Mr. Boles' mule?

A. Mr. Boles' mule.

Q. Did you have to make some change in the stirrups?

A. Yes, sir. Mr. Boles is rather tall. The stirrups was too long for me.

Q. And at about that time did Bob Ennis come up there?

A. Yes; he came along, checking the mules, and told me I was on the wrong mule.

(Testimony of Elmer H. Mateas.)

Q. Did either you or Mr. Boles say anything to him at the time?

A. Yes, sir. Mr. Boles and I spoke about it on the way down. We had some slight conversation to the effect that I was a green rider——

Mr. Schell: Just a moment.

A. ——and he was an experienced rider.

Mr. Schell: I move to strike out any conversation between this witness and Mr. Boles, without the presence of this defendant and hearsay.

Mr. Lincoln: That was on the way down, I understand.

The Court: Is it your purpose to show the truth of what was said or merely the oral fact?

Mr. Lincoln: Only as to the fact, sir. As to the truth of it, I imagine that is a matter for the jury to determine as a finality. [91]

The Court: I will receive this conversation between the two riders for the sole purpose of showing what in fact was said, not to show the truth of what was said. In other words, what these riders may have said, ladies and gentlemen, you understand would not be binding upon the defendant unless the defendant was there. So what was said will be admitted only for the purpose of showing the facts of what was said, but not the truth of what was said.

Q. (By Mr. Lincoln): Now, Mr. Mateas, will you give us, please, the conversation which you had with Mr. Boles on the way down before you got to Indian Gardens?



(Testimony of Elmer H. Mateas.)

Mr. Schell: May I have the same objection, your Honor, that it is incompetent, irrelevant and immaterial, hearsay, not within the issues, and would be purely hearsay, not part of the *res gestae*.

The Court: Is that the same question you are just repeating?

Mr. Lincoln: That is the same question; yes, sir.

Mr. Schell: To keep the record straight, he has re-asked the question and I have to repeat my objection.

The Court: Yes; I understand. Your objection will be overruled, and the evidence received for the limited purpose stated, namely, to show it was in fact said, and not the truth of what was said.

You may relate the conversation. [92]

The Witness: Shall I proceed?

The Court: Yes.

A. The conversation was not all at one particular time. There would be a few words every time he stopped my mule. And just the words there was, he asked if I was an experienced rider, which I was not.

The Court: No. What did you say and what did he say?

The Witness: I beg pardon?

The Court: What did you say and what did he say?

The Witness: Well, I don't remember the exact words.

The Court: Well, the substance of it.



(Testimony of Elmer H. Mateas.)

The Witness: Well, he asked me if I had ever ridden before. I told him no; I had ridden burros when I was a child and nothing since then. I asked him if he was an experienced rider. He said he was practically born on a mule; he had been on them since he was two years old, had been in pack trains, most everything.

This was not at one particular time. It was a little bit at particular different intervals. He offered to trade mules with me. I told him I would like to get off the mule I had but I wouldn't expect him to change with my mule. He assured me he could handle most anything. That was on the way down to Indian Gardens.

Q. (By Mr. Lincoln): Now, coming down to Indian Gardens and the time that Bob Ennis, the guide, came up to [93] talk with you about your change of stirrups, was there any conversation then or any talk between Bob Ennis and Mr. Boles and you with reference to your change of mules?

A. Yes, sir; there was more or less a three-way conversation.

Q. And will you tell us——

A. Bob Ennis told me I was on the wrong mule. I told him I realized that. Mr. Boles offered to trade with me because I couldn't handle my mule. And Bob said I had to keep the mule I started with. Mr. Boles told him that I had a skittish mule and that his mule was a perfectly safe mule, and he preferred to trade over. And Ennis insisted we couldn't do it.

(Testimony of Elmer H. Mateas.)

We had a few words back and forth to the effect that it was quite all right with Mr. Boles that we had traded mules, and still it was not satisfactory to Bob Ennis; that we had to remain on the mules we started with.

Q. Then you changed back, did you, to your original mules?      A. Yes, sir; we did.

Q. And Mr. Boles went on his No. 6 mule, whatever that was?      A. Yes, sir.

Q. And to the same place in the string where he had been going on the way down? [94]

A. Yes, sir.

Q. From the time that you started from Indian Gardens were you going steadily down hill?

A. Well, it was down hill all the way.

Q. And did something happen between you and this mule Chiggers as you got some little distance down?

The Witness: I didn't get that question.

The Court: Please read it, Mr. Reporter.

(Question read by the reporter.)

A. Yes, sir.

Q. About how far had you gone, could you say in miles or in time?

A. In miles I could not say. In time, I would say it was between a half hour and an hour.

Q. Tell us, please, just what happened as you remember it.

A. Well, the mules were kind of stringing out, becoming farther apart and the line was getting

(Testimony of Elmer H. Mateas.)

longer, and the guide stopped his mule to allow the other mules to catch up. So they all did, and Mr. Boles' mule stopped at kind of an irrigation ditch or something, apparently decided to get a drink of water. Mr. Boles kicked him in the ribs. He started up fast to keep up with the string. My mule started up fast right behind him. When Mr. Boles' mule reached the end of the line where he [95] should be, he stopped, my mule with him, where he left off running and started bucking, practically sort of one operation, one followed into the other. He continued bucking until I was thrown off.

Q. Well, what did your mule finally do?

A. He finally threw me off.

Q. Which end? I mean which end of the mule?

A. Over the mule's head.

Q. What? A. Over the mule's head.

Q. Over the mule's head. Well, which end of you did you light on?

A. I landed right on the base of my spine a little bit toward the right.

Q. On the ground, I suppose? A. Yes, sir.

\* \* \* \* \*

### Cross-Examination

By Mr. Schell:

Q. Mr. Mateas, you had ridden when you were a young man, had you not?

A. Never horses or mules.

Q. Had you ridden at all?

A. I have ridden burros when I was a young man. I was a child. I think I was about six years old.



(Testimony of Elmer H. Mateas.)

Q. You had ridden quite a bit hadn't you?

A. Not quite a bit; no, sir; just occasionally.

Q. You were in the Grand Canyon area in 1941?

A. Yes, sir.

Q. How long did you stay there at the time?

A. I believe we just stayed overnight that time.

Q. Was that when you decided that you wanted to go down the Canyon sometime?

A. We wanted to make the trail at that time, but reservations were harder to get. We would have a day or two wait and we didn't want to stay that long; so we figured we would come back some other time, and we continued on our original route.

Q. In other words, when you were there in [105] 1941 you would have gone down if you had been able to make the reservations?

A. Yes, sir.

Q. So, then in 1942 you went back for one of the express purposes of taking this trip down into the Canyon, is that right?

A. Yes, sir.

Q. When you saw these people, some of them, with the reins in their hands and some of them hanging on the saddle horn, that was in the corral, was it not?

A. Up on top of the rim. I was not quite sure of the question. You say when some people were or were not holding their reins. Yes, sir.

Q. That is, you noticed it in the corral on top?

A. Yes, sir.

Q. Before you had started your trip?

A. Yes, sir.



(Testimony of Elmer H. Mateas.)

Q. During the trip down and up to the time that you went off the mule, the mule had never bucked during that time, had it?

A. It did not buck on the way down; no, sir.

Q. And the only thing that the mule would do would be pull up along the mule ahead of him and go faster than that mule, is that hight?

A. Well, there was more than pulling up [106] alongside ahead. He was trying to squeeze through.

Q. As a matter of fact that entire trip is conducted in a walk, isn't it?

A. I did not get that question.

Q. The entire trip is conducted on a walk, is it not?

A. I don't follow that. The entire trip is on what?

Q. The mules do not trot; they walk all the way?

Q. Yes, sir.

Q. As a matter of fact up until the time just prior to this accident the mule never trotted at all, did he?

A. Are you speaking of my mule or the mules, all of them?

Q. No; your mule.

A. All the mules, they walked most of the time. I believe they walked all the time, other than my mule.

Q. As a matter of fact your mule walked all the time; it never broke into a trot until just before you went off the mule; isn't that right?

(Testimony of Elmer H. Mateas.)

A. No. He broke into a trot or a speed faster than a walk, overtook the man in front and tried to squeeze through.

Q. Did you keep the mule fairly close up to the mule ahead of you at all times?

A. Well, they would vary a little. When they hit a [107] sharp turn the mule would stop until the previous mule could negotiate the turn, and it died down and he would follow, sometimes would be fairly close, sometimes there might be six or eight feet or ten.

Q. When that turn was negotiated your mule would catch up with the other mule; isn't that right?

A. They were stringing back and forth all the time. Sometimes the whole string would be along, sometimes they would be all crowded more or less close to each other.

Q. Mr. Mateas, you remember your deposition being taken?           A. In your office?

Q. Yes.           A. Yes, sir.

Q. Mr. Lincoln was there?           A. Yes, sir.

Q. Represented you, and you were sworn as a witness. You were sworn by the reporter and you were asked certain questions?

A. I don't follow that.

Q. I mean the oath was administered to you before you testified, was it not?

Mr. Lincoln: Oh, we stipulated it was.

A. I still don't follow you there. The last I got was in your office, you and Mr. Lincoln and myself

(Testimony of Elmer H. Mateas.)

and my [108] wife, and a man recording it. I didn't follow you after that.

Mr. Schell: You stipulate that he was sworn?

Mr. Lincoln: Certainly, certainly.

Q. (By Mr. Schell): Then, afterwards, you read your deposition over and signed it, did you not?

A. Yes, sir; that is, I don't believe I read it at that time but it was agreed that it would be signed there, anyway.

Q. And you later did read it over and signed it?

A. I don't believe I read at the time; no, sir.

The Court: Later, you did? You later read it over and signed it? Later on, you read it over and signed it?

The Witness: I read it over later; yes, sir.

Q. (By Mr. Schell): And signed it?

A. It was already signed.

Q. What?

A. I believe it was already signed. But at any rate, I know what was in it at the time I read it; Yes, sir.

Mr. Schell: I don't know whether your Honor has the original deposition there or whether I should use this copy. I would have to approach the witness. I only have the one copy.

The Court: Is the deposition in the file, Mr. Clerk? Is there any objection to making use of the copy? [109]

Mr. Lincoln: Not at all, sir.

(Testimony of Elmer H. Mateas.)

The Court: Very well; you may show the witness the copy.

Mr. Schell: May I approach the witness, because I only have the one?

The Court: You may.

Mr. Lincoln: He can read from there and you take mine. If you say it is there, we know it is.

Mr. Schell: I will take this one because that is marked, and let him see that one.

Mr. Lincoln: That is quite all right.

Q. (By Mr. Schell): Calling your attention to page 6, Mr. Mateas—— A. Yes, sir.

Q. Beginning on line 10 down to line 20, will you read that to yourself first?

A. From line 10 to line 20?

Q. Yes; to and including line 20. Is that correct? A. Yes, sir.

Q. I will read that portion of it.

“Q. In other words, he didn’t buck but he just tried to pass the mule ahead of him?

“A. No; he just tried to get ready to run, but he didn’t buck at any time until the actual occurrence.

“Q. Would he trot? [110] A. What?

“Q. Would he trot when he would try to get ahead, or just walk fast?

“A. Oh, the mules were pretty close behind one another, and he would just try to squeeze in and get through. There wasn’t room for him to start trotting.”



(Testimony of Elmer H. Mateas.)

Mr. Lincoln: We object to that quotation, your Honor, as entirely immaterial and not in any manner impeaching what the witness has already testified to.

The Court: Did you so testify?

The Witness: Sir?

The Court: Did you so testify?

The Witness: Yes, sir; and I still agree with that.

The Court: Very well.

The Witness: But the mule, if he was merely walking, he would have no method of catching up with the mule in front.

The Court: The objection is overruled.

The Witness: He was unable to——

The Court: Just a moment. Do not volunteer anything.

The Witness: I was just explaining it.

Mr. Lincoln: Whatever the gentleman just said to your Honor may be stricken out, I trust?

The Court: Very well.

Mr. Schell: Just one moment, your Honor. [111]

Q. Will you look on page 7, Mr. Mateas, beginning with line 18? A. 18?

Q. Yes; down to page 8, line 19, and read that to yourself. A. Page 8?

Q. Starting on page 7, down on line 18, down to line 19 on page 8. A. Down to what line?

Q. 19. A. 19. Yes, sir.

Q. Have you read that? A. Yes, sir.

(Testimony of Elmer H. Mateas.)

Q. Did you so testify?           A. Yes, sir.

“Q. Did you say anything to the guide at Indian Gardens about the mule?

“A. Well not directly, but he knew we wanted to change mules. The man riding in front of me said he was an experienced rider, riding mules, and he offered to trade mules with me and——

“Q. Who was that?           A. Pardon?

“Q. Who said that?

“A. Whoever the man riding in front [112] of me next to the last one in line. He said he was an experienced mule rider and he offered to trade mules with me.

“Q. Who did he say that to?

“A. Pardon?

“Q. Who did he say that to?

“A. To me.

“Q. To you?

“A. Yes. We traded mules. I didn't know the difference in the mules until we got on them. The stirrups on my mule, naturally, were a lot shorter than his, and we got to regulating the stirrups, and the guide, checking up, saw the wrong mule and he made us get off and go back to our mules. I was put back again on the mule that I had originally.

“Q. But nothing was said to the guide about why——

“A. No, I don't believe so.

“Q. ——you wanted to change mules?

“A. I don't think we did, no.”

(Testimony of Elmer H. Mateas.)

The Witness: If you would continue that, it explains itself.

Q. (By Mr. Schell): Now, Mr. Mateas——

The Court: Just a moment. The witness wants to make an explanation.

Mr. Schell: I beg your pardon. [113]

The Court: What portion do you want to read?

The Witness: The same as he previously had me read was true as far as he got, but he stopped reading too soon.

The Court: You read any of the rest of it you wish to read.

The Witness: Sir?

The Court: You read any of the rest of it that you wish to read.

The Witness: Just one of the previous ones, the previous one about the mule walking; that he didn't trot. He stopped at about line 19, I think. He asked if the mule would trot when he tried to get ahead or just walked fast. I replied that "mules were pretty close behind one another, and he would just try to squeeze in and get through. There wasn't room for him to start trotting. There wasn't room for him to really try to trot or run, because the mules were too close to one another. He just tried to squeeze through.

"Q. Walking?

"A. It was more than a walk. He was in a hurry, in other words.

"Q. A fast walk, or was it a trot or what was it?

(Testimony of Elmer H. Mateas.)

“A. Well, he would try to break into a trot.

“Q. Did he get into a trot?”

I did not hear the question and he repeated it:  
“Did he actually trot? [114]

“Well, on some of the occasions he probably was able to and some he probably wasn't. It depends on how much the mules were spread out back and forth.”

The Court: Is that part of the testimony you gave in your deposition?

The Witness: Yes, sir. And then the one he just had now. I think he stopped on line 19. He said that he didn't think I had told him why I wanted to change mules. Continuing on line 20:

“Q. In other words, you had no conversation with the guide at any time about the mule until after the accident?

“A. No; I wouldn't say that. I think I objected to the mule being a little bit too frisky. At the time we discovered we were on the wrong mule we told him that we would like to change mules, that I preferred a slower mule, and this other fellow said he could handle any kind of mule, but he said he wasn't allowed to do that, or words to that effect, that we had to stay on the mules he gave to us at the top”

I think that is about as far as that pertains to it.

The Court: Is that part of your testimony?

The Witness: Yes, sir.



(Testimony of Elmer H. Mateas.)

The Court: At the time of your deposition?

The Witness: Yes, sir. [115]

Q. (By Mr. Schell): Now, Mr. Mateas are you positive that you did mention anything to the guide about the mule now?

A. I was not positive of the exact words, but I am positive that he was informed.

Q. Positive that you had some conversation with him about it? A. Yes, sir.

Q. Turning to page 26, lines 14 to 18—26, lines 14 to 18. A. From what line?

Q. 14 to 18 on page 26. You testified?

A. Page 26, line 14?

Q. 14 to 18; yes. A. 14 to 18.

Q. “Q. Did you say anything to Bob as to why you were on the other mule?

“A. I may have mentioned I was afraid I couldn’t handle the mule. He was kind of frisky, and I wasn’t an experienced rider.”

You had some doubt, did you not, at that time as to whether you did or did not mention it to him?

A. No, sir. The same way, again, if you continue on the page it explains the question.

Q. Did you have any doubt, Mr. Mateas, at [116] that time?

A. My only doubt was as to the exact words. I never pretended to remember the exact words.

Q. In other words, you remember saying something but you do not remember the exact words?

A. I don’t remember the exact words; no, sir.

(Testimony of Elmer H. Mateas.)

Q. Mr. Mateas, were you interviewed in the hospital by someone shortly after the accident, two or three weeks after the accident?

A. I don't remember how long after the accident somebody came to the hospital.

Q. You were asked certain questions as to what occurred, were you not? A. Sure.

Q. You were asked certain questions as to what occurred?

A. Yes, sir; he asked a lot of questions.

Q. And then a statement was written up, was it not? A. Yes, sir.

Q. And you read it over? A. No, sir.

Q. Did you sign it?

A. He read it back.

Q. Did you sign it? A. Yes, sir.

Q. Was that statement true? [117]

A. As far as I recall and read back it is true; yes.

Mr. Lincoln: May I have that answer, if your Honor please?

The Court: Please read it, Mr. Reporter.

(Answer read by the reporter.)

Mr. Lincoln: Thank you.

Mr. Schell: May I approach the witness?

Q. I ask you, Mr. Mateas, if that is your signature? A. Yes, sir.

Q. On the first page? A. Yes, sir.

Mr. Lincoln: Stipulated it is his signature on every page, if that is what you desire to prove.

(Testimony of Elmer H. Mateas.)

Mr. Schell: You stipulate it is on every page, is that it?

The Witness: Yes, sir.

Q. Calling your attention to this portion of the statement, starting with here, that would be on the third page of the statement, the second sentence, starting on that down to the word "guide" on the second to the last line. You have read that, have you? A. I read it; yes, sir.

The Court: You may read the entire document if you desire, if you are asked any questions concerning it.

Mr. Schell: Yes, sir. If you wish to read it all, you [118] may do so. The judge is speaking.

The Court: I say, if you wish to read it all, you may do so before you are asked any questions concerning it.

Q. (By Mr. Schell): This statement was read to you before you signed it, was it not?

A. Yes, sir.

Q. And the facts stated therein are true?

A. The two parts in which I don't recall, one is that section there I don't recall, "There was no conversation." It is true that I got on the wrong mule. I didn't purposely change mules. That was Mr. Boles' part. And the other part was, he questioned me closely about any bees or wasps flying around the Canyon, and that part is not down there.

Q. I mean the facts set forth therein are correct?

A. They are what?

Q. I say, these facts are the facts in the statement you signed?

(Testimony of Elmer H. Mateas.)

A. Most of them, but on the mule there, he states that I did not inform Bob. I know that I did.

Mr. Schell: We offer the statement into evidence, if the court please.

Mr. Lincoln: We certainly will object to it, your Honor, upon the statement the witness just made, namely, that certain portions of it are not correct. Your Honor will [119] remember that the witness has stated that the document was not read by him before he signed it, but it was read over to him before he signed it.

The Court: You object that no foundation has been laid?

Mr. Lincoln: Yes, sir.

The Court: Sustained.

Q. (By Mr. Schell): The portion on page 2, or page 3, that I particularly called your attention to, you read that over, did you not?

A. Yes. I would say what is on page 2 I read all of it.

Mr. Lincoln: Wait a moment. We respectfully object, your Honor, to any interrogation with relation to this instrument, on the ground that your Honor has already ruled no proper foundation.

The Court: Overruled. He may attempt to lay a further foundation.

Q. (By Mr. Schell): You read that portion over that I particularly called your attention to first?

A. Well, I read the whole thing. I am not sure what is on page 2.

Mr. Lincoln: Page 3?



(Testimony of Elmer H. Mateas.)

The Court: You mean he read it today?

Mr. Schell: Yes; just now. I called his attention, if your Honor remembers, to one part of it first.

The Witness: Which part? Down to this point it is all true.

The Court: The witness is referring to what page, what page number and what document?

Mr. Schell: It is page 3, beginning with line 3, down to where did you say? You will have to point that out again. Down to where did you point?

The Witness: Down to about this point here (indicating in document).

The Court: He says that portion he did say?

Mr. Schell: Yes, sir.

The Court: Is that your testimony? Did you tell the man who wrote that what is on page 3 down to that point?

The Witness: He asked a lot of questions.

The Court: Did you make that statement?

The Witness: Most of the statement is correct, except the one point I disagree with, and there was one point we went into that is not down at all. Otherwise there is just a lot of questions he wrote in the first person as though I wrote them myself.

The Court: You may read it.

The Witness: And he made me sign every page.

The Court: You may have the witness read, if you desire, the portion he said he did state. [121]

Mr. Schell: All right.

Q. Will you read that portion that you say you

(Testimony of Elmer H. Mateas.)

That is what your Honor meant, isn't it?

The Court: Yes.

The Witness: Where do you want to start, "The man ahead of me was an experienced rider?"

Mr. Schell: Yes.

A. (Reading): "The man ahead of me was an experienced rider. He and I changed mules. I did not do this on purpose, but mounted the wrong mule. I was on the mule that the man ahead of me had been riding. However, the guide noticed the change and asked us to change to the mules that we had started out with. The rider of the other mule suggested that I stay on his mule after we had made the change, because of his experience in riding. However, the guide noticed that the stirrups were too long and then asked us to change mules."

Q. Isn't it a fact, Mr. Mateas, that you did not say anything to the guide that you wanted to change mules?

A. The fact that I didn't say anything, no, sir; it is not a fact. I did say.

Q. Isn't it a fact that you did not say anything and that you did not hear Mr. Boles, the other man, say anything to the guide? [122]

A. I did not get that.

Q. Isn't it a fact that you did not say anything to the guide that you wanted to change mules, nor did you hear Mr. Boles say anything to the guides to that effect?

A. It was a three-way conversation.

Mr. Schell: Just answer that yes or no, please, and then you can explain. Will you read it, please?

(Testimony of Elmer H. Mateas.)

The Court: Please read it, Mr. Reporter.

(Question read by the reporter.)

The Court: I think if you will divide it in two, you will get along faster.

Mr. Schell: I will reframe it. It is compound.

Q. Isn't it a fact that you did not say anything to the guide that you would like to ride this other mule? A. That is not a fact; no.

Q. And isn't it a fact that you did not hear Mr. Boles, or the other gentleman, say anything to the guide about changing mules?

A. That is not a fact, either.

Mr. Schell: If the court please, I would like, then, to offer into evidence the signed portion of this statement for the purpose of impeachment.

The Court: It has been read, the portion you have identified so far.

Mr. Schell: The entire statement is signed at the [123] bottom of each page, your Honor.

The Court: Well, he did not write it and he did not read it before he signed it. It was written by someone else and read back to him.

Was it read back to you in its entirety?

The Witness: What is that?

The Court: Was all of it read back to you at the time?

The Witness: As far as I recall, and I don't recall that particular paragraph there, and there was one more part we went into very carefully that is not down at all.

(Testimony of Elmer H. Mateas.)

Q. (By Mr. Schell): In other words, you discussed something during the conversation that was not put into this statement, is that right?

A. Well, there was a lot of discussion or conversation back and forth about the Canyon, the trip, and a lot of personal conversation involved between the adjuster and my wife and me.

The Court: But what he did put down there, what is on that statement, did you say to him?

The Witness: I agree on everything except that one part there. I don't agree on that.

The Court: Which part is that?

The Witness: The part he states in there that I did not say anything to the guide.

The Court: You did not say that to him? [124]

The Witness: That is what it says in there, but not true.

The Court: I will receive the document.

Mr. Lincoln: May it be received, your Honor, with the understanding that there is that particular clause in it which should not be in it?

The Court: It will be received as part of the evidence in the case.

The Clerk: This will be marked Defendant's Exhibit H.

The Court: Defendant's Exhibit H in evidence.

Q. (By Mr. Schell): About how long did you ride after you left—

Possibly we should read that to the jury now while it is in evidence, or defer that until later?

The Court: If you desire.

Mr. Schell: Possibly we should read it to them now, I think.



(Testimony of Elmer H. Mateas.)

“Grand Canyon, Ariz.

“July 6, 1942

“Report of Elmer Mateas:—

“My name is Elmer Mateas, age 29, married, residing at 433 Washington Ave., El Monte, California. We have lived there for the past 6 months. We formerly lived at 1743 Waco, Baldwin Park, California, we lived there for about 5 years. I am a plaster [125] contractor, and work for myself. I am not a member of any union. On June 17, 1942, Mrs. Mateas and I decided to take a mule trip down the Bright Angel Trail. We left the top of the Canyon about 11:30 a.m. We were going to take the overnight trip and stay at the Phantom Ranch. We arrived at the corral about 11:00 a.m. We did not choose our own mules, but the trail-master picked out the mule for each member of the party. We were not asked any questions concerning our riding ability. When the party”——

And then there is a signature “Elmer H. Mateas” at the bottom.

“started down the trail. I was the last member of the party. When we had just gone a short ways from the head of the trail my mule acted up with me. By this I mean that he did not like to be the last mule. He would try to pass the mule ahead of me. The mule tried to do this about six or seven times, at one time

(Testimony of Elmer H. Mateas.)

the man ahead of me grabbed the reins of my mule and held him back. Another time the mule got so close to the one ahead of him, that the other mules tail became entangled in the halter and reins of my mule. On the way to Indian Gardens most of this took place. Then we stopped at Indian [126] Gardens and had lunch. Before we got to the Gardens, the man ahead of me reached over and picked a rock from the wall of the Canyon, this dislodged some small rocks and dirt, and the noise caused my mule to bolt again. I have had some experience”  
(Signature) “Elmer H. Mateas.”

“in riding, but not since I was a small boy. It has been about 20 years since I rode. The man ahead of me was an experienced rider, and when we left Indian Gardens to continue on down the trail he and I changed mules. I did not do this on purpose, but mounted the wrong mule. I was on the mule that the man ahead of me had been riding. However, the guide noticed the change and asked us to change to the mules that we had started out with. The rider of the other mule suggested that I stay on his mule after we had made the change, because of his experience in riding. However, the guide noticed that the stirrups were too long and then asked us to change mules. I did not say anything to the guide that I would like to ride this mule, and I do not know if the other man said

(Testimony of Elmer H. Mateas.)

anything to the guide. After the party was lined out, we started down the trail again. When we were about  $\frac{1}{2}$  mile from the river, my mule bucked me off. Shortly before this the party straggled out on the trail and from the mule ahead of me to the rest of the party was about  $\frac{1}{2}$  block. I was about"

I can't read this one word.

"I was about 10 feet from the mule ahead of me. Then it appeared as if everyone was trying to make their mules catch up with the rest of the party. The man in front of me kicked his mule, to urge it on to catch up, and just as the mule in front of me started running, mine did, too. I could not hold him back, and, as he approached the party he tried to pass them again. The party was on the trail, and was not stopped. I do not know how close I was to the rest of the party, nor do I know when my mule stopped running or started bucking. I remember that the mule bucked several times before I was thrown off. I went off the head of the mule, and struck the ground, with my back. It seemed as if the right side of my back struck the gravel, in the area between my spine and my hip. The pain was immediate and was intense. I also realized that my legs from the hips down were paralyzed. I thought that my back was broken. The guide came back immediately and asked me what was wrong and I told him that I thought my hip or [128] back was broken.



(Testimony of Elmer H. Mateas.)

They made me as comfortable as was possible, then I stayed there until the doctor came. The doctor examined me, then gave me a shot, and brought me out of the canyon on a mule stretcher. I was taken to the hospital at the Canyon, and have been under the doctor's care ever since. The pain was very severe at first, and bothered me whenever any movement was necessary. About one week ago the doctor strapped me up and I could move with some degree of comfort. However, I still have pain when I move. I have been able to walk some in the last two days. The doctor has taken X-rays of my back and he has determined that there are no broken bones. I do not know just what is wrong with my back. I never had a back injury before, and have never been injured on my right side before. When I get back home I will go to see Dr. Sloan. He is my doctor. His office is located on Manchester Blvd. in Ingelwood, California. I have a health and accident policy with the Mutual Benefit of Omaha, Nebraska."

(Signed) "ELMER H. MATEAS." [129]

The Court: We will take the afternoon recess at this time.

(The court admonished the jury.)

The Court: You are now excused for a five-minute recess.

You may step down.

(Short recess.)



(Testimony of Elmer H. Mateas.)

The Court: Is it stipulated, gentlemen, that the jurors are all in their places?

Mr. Lincoln: Yes, sir.

Mr. Schell: So stipulated.

The Court: Proceed.

Q. (By Mr. Schell): About how long had you ridden from the time you left the Indian Gardens until this accident happened?

A. Between a half an hour and an hour.

Q. And at the place where the accident occurred was the trail more or less level?

A. I didn't get the question.

Q. At the place where the accident occurred was the trail more or less level?

A. It was much more level than it had been.

Q. In other words, you were not very far from the river bottom there, were you?

A. I don't know personally, but I understand it is about [130] a half a mile.

Q. From the time you left the Indian Gardens up until the time the accident happened you had no trouble whatsoever with the mule, did you?

A. Not that I recall; no, sir.

Q. When did you leave the Grand Canyon to come back to Los Angeles?

A. It was three weeks to the day, July 3rd, I believe, or July 5th.

Q. There has been introduced in evidence a picture of a party and you in the party on the mule. You were the last one in that group shown in the picture. That was taken about a half a mile from the start, was it not?

(Testimony of Elmer H. Mateas.)

A. It is hard to say, but very close to the top.

Q. And the party stopped there and had their pictures taken?      A. Yes, sir.

Q. And there the cinches were checked and the equipment and the saddles?

A. I believe that is where they checked them.

Q. Can you tell us about how long the trip was in actual travel time from the time you left the corral until you got to Indian Gardens?

A. It was about three hours to Indian Gardens, approximately. [131]

Q. Did you stop at all on the way outside of that place where you had your picture taken?

A. From the top to Indian Gardens up to that point, no.

Q. Then it was something like a half an hour to an hour from there on to the point of the accident, is that right?      A. Yes, sir.

Q. At the time that the accident happened was the first time the mule had bucked during the entire trip; is that not right?

A. The first time what?

Q. The mule had bucked?      A. Yes, sir.

Mr. Schell: That is all.

Mr. Lincoln: May I see that exhibit, Mr. Clerk, that last one that was introduced, the yellow sheets?

(Testimony of Elmer H. Mateas.)

Redirect Examination

By Mr. Lincoln:

Q. Mr. Mateas, these yellow sheets which have been shown to you, which have been introduced as Exhibit H, are not in your handwriting, are they, except where your signature appears on each page.

A. No, sir. [132]

Q. I understand you to say that before you signed any one of those pages you did not read over this document, is that right?

Mr. Schell: Objected to as leading and suggestive.

A. I never read over, personally, the document.

The Court: Sustained.

Q. (By Mr. Lincoln): Did you read over this document before you attached your name to any one of the pages?

A. I did not read it; no, sir.

Q. Did the person, whoever it may be, read something to you before you signed it?

A. Yes, sir.

Q. Do you know whether or not this person read everything which was on these pages before you signed it?

A. Mr. Schell had me read it back. I recall he read probably everything except that one point and points that are not included.

Q. Did anybody ever give you a copy of that document? A. No, sir.

(Testimony of Elmer H. Mateas.)

Q. Did you ever read it yourself before today?

A. No, sir.

Q. Do you remember what time of day it was that this gentleman came in to see you in the hospital?

A. I believe in the afternoon. I don't recall correctly. [133]

The Court: Do you remember the date? Do you remember the date?

The Witness: No, I don't.

The Court: About when was it?

The Witness: I would say it was more than a week after I had been in the hospital, probably during the second week.

The Court: The second week you were in the hospital?

The Witness: Yes, sir.

The Court: After the accident?

The Witness: Yes, sir.

Q. (By Mr. Lincoln): Were you in bed at that time?

A. I believe I was starting to get up, which would make it about two weeks after the accident. I believe I started to get up. I was in bed when he came, but I was starting to be able to get up in a wheel chair.

Q. Were you in bed during the conversation that you had with this person?      A. Yes, sir.



(Testimony of Elmer H. Mateas.)

Q. And during that time were you suffering any pain at all?

A. I was suffering pain all the——

Mr. Schell: That is objected to as leading and suggestive.

The Court: Overruled.

Mr. Lincoln: Now you may answer, please. [134]

A. The same question? Obviously, because I was suffering pain all the time I was in the hospital.

Mr. Lincoln: That is all.

Mr. Schell: No further questions.

The Court: Does any member of the jury have any questions?

You may step down, Mr. Mateas. You may step down. Call your next witness.

Mr. Lincoln: May I be permitted, your Honor, to call one witness out of turn? I have a lady here who is a working lady and who has just been excused from her employment temporarily.

Mr. Schell: I have no objection.

The Court: You may.

Mr. Lincoln: Thank you, sir. Mrs. Vogel, would you come forward, please?

MRS. ELLA W. VOGEL

called as a witness by plaintiff, being first sworn,  
was examined and testified as follows:

The Clerk: Please state your name.

The Witness: Mrs. Ella W. Vogel.

The Clerk: Mrs. Ella W. Vogel, V-o-g-e-l?

The Witness: Yes, sir. [135]

Direct Examination

By Mr. Lincoln:

Q. Where do you live, Mrs. Vogel?

A. 96 North Catalina, in Pasadena.

Q. Do you know Mr. Mateas who just testified?

A. Well, I met him first on this party.

Q. Are you related to him in any way?

A. No, sir.

Q. Do you know Mrs. Mateas, his wife?

A. Well, I met her at the same time.

Q. Was that the first time you had met them?

A. Yes, sir.

Q. Are you related to her in any way?

A. No.

Q. Do you have any interest whatsoever in the  
outcome of this case?           A. No.

Q. Do you remember an excursion—may that be  
withdrawn? Did you about the 17th of June, 1942,  
have occasion to go to the Grand Canyon in  
Arizona?           A. Yes, sir.

Q. On that day were you a party or a member  
of a party which went on a mule ride down the Can-  
yon to go to the Phantom Ranch?

A. Yes, sir. [136]

(Testimony of Mrs. Ella W. Vogel.)

Q. I show you a photograph, Exhibit 4, which has been introduced here and ask you whether or not you recognize any person in the photograph? Particularly, do you recognize yourself in that photograph? A. Yes.

Q. And which one, if at all, are you?

A. Well, I am the——

Q. Figuring from the top down, if you will, please?

A. The third one from the top.

Q. The third one from the top. That was just ahead of Mr. Boles, was it? A. Yes, sir.

Q. First came Mr. Mateas, then Mr. Boles and then yourself, is that right? A. Yes.

Q. Did you ever have occasion to ride a horse or mule before? A. Yes.

Q. On any excursion somewhat similar to this?

A. In the Sierra Navadas I went on a pack train.

Q. In the Sierra Nevadas? A. Yes.

Q. How long before this particular trip was that excursion?

A. I don't exactly remember; a couple of years, probably. [137]

Mr. Lincoln: Can the jurors all hear this lady, your Honor?

Q. On this particular trip, as you went down did you notice the actions of the mule ridden by Mr. Mateas? A. Yes; I did.

Q. Would you be good enough to describe them to the jury?

(Testimony of Mrs. Ella W. Vogel.)

A. Well, he acted as if he was getting ready to buck frequently.

Mr. Schell: Just a moment. We move to strike that as a conclusion of the witness.

The Court: Yes; that may be stricken. Try again, Mrs. Vogel, to describe it as best you can.

A. Well, I thought he was going to buck.

Mr. Schell: I move to strike that out as not responsive to the question and a conclusion of the witness.

The Court: Motion granted. How did he appear to you? Tell us what he was doing.

The Witness: I don't know how to describe it. I know that—well, I don't know how to describe it.

The Court: Do the best you can.

Q. (By Mr. Lincoln): Well, Mrs. Vogel, tell us what the mule did as you saw it.

A. In fact, I thought he bucked before we got down there, because it caused such a commotion every time, which [138] was at least a dozen times.

The Court: Is that the way it appeared to you?

The Witness: Yes.

Mr. Schell: I move to strike out the answer as not responsive to the question and a conclusion of the witness.

Mr. Lincoln: I submit, your Honor, that it is responsive to the question.

The Court: The motion is denied. She has used "thought" in the sense of how it appeared. Is that the way it appeared to you?

The Witness: Yes. I was worried because—



(Testimony of Mrs. Ella W. Vogel.)

The Court: No; you do not need to tell us that.

Mr. Schell: I move the answer go out.

Mr. Lincoln: It may go out.

The Court: Motion granted.

Q. (By Mr. Lincoln): Mrs. Vogel, the party arrived at Indian Gardens. Do you remember whether or not it stopped at any time?

A. I think it stopped several times.

Q. And we will say, perhaps, on one occasion did you have any talk with Mr. Bob Ennis, the guide?

A. Well, he came back to adjust my stirrup straps. I couldn't seem to get them just the right length.

Q. Did you have some talk with him at that time?

A. Well, I asked him if Mrs. Rayle's mule was all right.

Q. And which was Mrs. Rayle? [139]

A. Mrs. Rayle is the—she is next to the last in the party. She is right behind Bob.

The Court: Bob who?

The Witness: Ennis, the guide.

The Court: He was leading the party?

The Witness: Well, I mean she was second in the party.

The Court: She was next to the bottom of the photograph?

The Witness: Yes.

The Court: Is that Exhibit 4?

The Witness: Yes.

(Testimony of Mrs. Ella W. Vogel.)

Q. (By Mr. Lincoln): What else did you say to Mr. Ennis at that time, if anything?

A. Well, I don't know. We talked about the mule.

Q. Which mule?

A. Well, I was worried for fear Mrs. Rayle——

The Court: She was next to the bottom of the photograph?

The Witness: Yes.

The Court: Is that Exhibit 4?

The Witness: Yes.

Q. (By Mr. Lincoln): What else did you say to Mr. Ennis at that time, if anything?

A. Well, I don't know. We talked about the mule.

Q. Which mule?

A. Well, I was worried for fear Mrs. Rayle——

Mr. Schell: No. Just a moment. I move to strike the answer.

The Court: We are not interested in what was going on in your mind, Mrs. Vogel. We are interested in what was said and done.

A. Well, I asked him if Mrs. Rayle's mule was all right.

Q. (By Mr. Lincoln): What did he say?

A. He said, "Yes." And then I called to Mrs. Rayle and asked her. She made some remark about he was a [140] sloppy mule or something, just joked along.

Q. And this was when Bob was there?

A. Yes.

(Testimony of Mrs. Ella W. Vogel.)

Q. Now, was there any conversation about any other mule?

A. Well, I don't know that I said anything in particular. I know there was conversation.

Q. At this particular time?

A. At that time; yes.

Q. All right. As I understand it, again, now you were just immediately in front of Mr. Boles; that is right? A. Yes.

Q. During the ride down did you hear any conversation between Mr. Boles and Mr. Mateas?

A. Yes; lots of it.

Mr. Schell: Just a moment. That is objected to, if the court please, as incompetent, irrelevant and immaterial, and pure hearsay insofar as this defendant is concerned.

The Court: The question is merely directed to whether or not there was conversation. The objection is overruled. The answer may stand.

Q. (By Mr. Lincoln): Will you tell us, please, what was the substance of that or any other conversation which you may have heard? Just a moment, please.

The Court: The same objection? [141]

Mr. Schell: The same objection, your Honor.

The Court: Do you offer it for the purpose of proving the truth of what was said or the fact that something was said?

Mr. Lincoln: No, sir. I offer it for the same reason which I offered the testimony of Mr. Mateas

(Testimony of Mrs. Ella W. Vogel.)

in relation to the same matter, that is, that this was said. As to whether it was the truth or not is a matter, perhaps, for the jury to determine, your Honor.

The Court: For that purpose, the objection is overruled.

We receive evidence of this conversation, ladies and gentlemen of the jury, not for the purpose of proving the truth of what was said, but merely proving the fact as to what was said, oral facts, the words spoken, but not as to the truth of the words spoken.

Mr. Lincoln: And not necessarily, of course, your Honor, as to the untruth of it.

The Court: Yes. But the meaning that I want to instruct the jury about is that two people saying something does not prove it is true. It does prove that it was said, and those are part of the facts, part of the events that occurred, apparently, on this trip. So you are to consider this conversation only as a fact, words spoken, and not as evidence of truth of the words spoken. [142]

Mr. Schell: As to that, if the court please, it would not in any way be binding on these defendants, because it would be purely hearsay as to them.

The Court: It would be hearsay as to the truth of what was said, but would not be hearsay as to the fact that certain words were spoken. This witness, if she testifies to it, will testify that she heard it; so it cannot be hearsay as to her that certain words were spoken.



(Testimony of Mrs. Ella W. Vogel.)

Mr. Schell: As to that, if the court please, it would not in any way be binding on these defendants, because it would be purely hearsay as to them.

The Court: It would be hearsay as to the truth of what was said, but would not be hearsay as to the fact that certain words were spoken. This witness, if she testifies to it, will testify that she heard it; so it cannot be hearsay as to her that certain words were spoken.

Mr. Schell: No. But as to the defendant, though, however.

The Court: As to the defendant, so far as the truth of the words spoken is concerned, it is hearsay; and I am receiving the evidence, and I am sure the jury understands that they are to consider it, only for the purpose of knowing what was said and done, and not as to the truth of what was spoken.

You may proceed.

Q. (By Mr. Lincoln): Had you ever met Mr. Boles before this particular occasion?

A. No.

Q. Do you know what office, if any, he holds?

Mr. Schell: That is objected to as calling for a conclusion, if the court please.

Mr. Lincoln: Just a moment.

The Court: Sustained. It is assuming facts not in [143] evidence.

Q. (By Mr. Lincoln): About these conversations, was there more than one conversation between Mr. Mateas and Mr. Boles before you got to Indian Gardens? A. Yes.

(Testimony of Mrs. Ella W. Vogel.)

Q. Were they all on somewhat the same subject or were they all different?

A. Almost all the talk on the way to Indian Gardens was about that fractious mule.

Mr. Schell: Now, just a moment. May we have the question answered and no further comment volunteered?

Mr. Lincoln: Just confine your answer, Mrs. Vogel, please, to whether they were on the same subject or whether they were on different subjects.

Mr. Schell: If the court please—might it be stipulated, counsel, that my objection goes to this entire line of conversation?

The Court: Do you desire to strike this last answer?

Mr. Schell: Yes, if the court please.

The Court: The answer may be stricken.

Mr. Lincoln: We have no objection, if the court please. It should be.

The Court: Yes. Well, it is understood that your objection heretofore made goes to any part of the conversation that occurred outside of the presence of any representative of the defendant; and the jury is to understand that [144] any conversation that occurred outside of the presence of a representative of the defendant is admitted solely for the purpose of evidence of what was said, and not evidence as to the truth of what was said.

Q. (By Mr. Lincoln): Now, Mrs. Vogel, we come back to this question: Were these different conversations all on the same subject?

A. We talked about other—

(Testimony of Mrs. Ella W. Vogel.)

Q. No. Just tell me yes or no.

A. ———things, but it was mentioned all the way down the trail, it was.

Mr. Schell: I move the answer go out as not responsive.

The Court: Motion denied.

Q. (By Mr. Lincoln): Now tell me, please, what these conversations were as nearly as you can remember, that is what Mr. Boles said and what Mr. Mateas said.

A. Well, it started at the top of the trail and Mr. Boles, one of the first things I remember was that Mr. Boles said, "What is the matter with that ornery mule? Does he have a 'bee in his bonnet?'"

The Court: Said that to whom?

The Witness: He to Mr. Mateas. And I could hear everything he said, because I was in front of him.

Q. (By Mr. Lincoln): Did Mr. Mateas say anything to that? [145]

A. Oh, they just laughed about it. And then frequently Mr. Boles tried to give him advice about how to handle the mule. Mr. Boles is head of the Sierra Pack Train in the Sierras.

Mr. Schell: I move to strike that out as a conclusion of the witness and not responsive to any question.

The Court: Is that what he said?

The Witness: Yes. He told us about that on the way down.

The Court: Motion denied.

(Testimony of Mrs. Ella W. Vogel.)

The Witness: He was with the National Geographic Society. And at least half a dozen times on the way to Indian Gardens he offered to ride the mule, to change mules.

Q. (By Mr. Lincoln): That is Mr. Mateas' mule, do you mean?

A. Yes. I can't remember the exact conversations that took place, but I know, for one thing, they talked about maybe it would be better for him to get off and lead the mule. You couldn't help but see that the mule was not the——

The Court: You are just asked as to the conversation.

The Witness: What is that?

The Court: You are just asked as to the conversation.

Mr. Schell: I move that answer go out, then, as to that portion, as volunteered.

The Court: Beginning "You couldn't help," that may go [146] out.

Mr. Lincoln: Pardon me. I understand the lady to say that was a part of that conversation.

Q. Is that right?

A. Yes, sir. Those were the things we talked about going down.

The Court: Please read that portion of the answer beginning, "You couldn't help," Mr. Reporter.

(Answer read by the reporter as requested.)

The Court: That was not said, that part, "you couldn't help," beginning "You couldn't help?"



(Testimony of Mrs. Ella W. Vogel.)

The Witness: No. That was my own words.

The Court: That portion will be stricken and the jury instructed to disregard it. Proceed.

Mr. Lincoln: I am sorry, your Honor. I thought it was a portion of the conversation.

Q. Do you remember any other portion of this conversation between Mr. Boles and Mr. Mateas which you have not given?

A. No; not on exact words, but I know there was a lot said.

The Court: Just tell us the substance of it. You do not have to remember the exact words. What was the substance of what was said and who said it? Now, do not add your own observations. Just say what they said. [147]

The Witness: Well, they kept kind of kidding him about the mule and—I don't know.

Q. (By Mr. Lincoln): When you got down, do you remember when you got down to Indian Gardens? A. Yes.

Q. And did all the party dismount down there?

A. Yes.

Q. Did they have lunch? A. Yes.

Q. Then when you came to mount again did anyone assist you to mount your mule?

A. I don't remember.

Q. Do you remember seeing Mr. Ennis, that is the guide, assisting any of the other ladies to mount their mules?

A. Well, yes. He saw that they were all properly mounted. He adjusted my stirrup straps again.

(Testimony of Mrs. Ella W. Vogel.)

Q. Yes. Did you notice what mule Mr. Boles was on?

A. Well, he and Mr. Mateas had exchanged mules.

Q. You noticed that, did you?                      A. Yes.

Q. Did you hear any conversation with regard to that exchange of mules between Mr. Ennis, Mr. Boles and Mr. Mateas?

A. Yes. I heard Bob Ennis tell him to get back on [148] his own mule, on the mule he started with.

The Court: Tell who?

The Witness: He told—he told Mr. Boles to ride his mule and Mr. Mateas to ride his mule.

Q. (By Mr. Lincoln): And what, if anything, did Mr. Boles say in answer to that?

A. Well, he said that he was afraid that Mr. Mateas' mule would buck, and that being that he knew how to handle mules better, why, he thought he should ride him.

Q. Well, what did Bob say to that?

A. He said that we were all to ride the mules we started with.

Q. Did you see them change back then to the mules that they had?                      A. Yes.

Q. And did you see the accident itself when it happened?                      A. Yes.

Q. Will you describe that as well as you can, that is, tell the jury what you saw?

A. Well, I heard a commotion and, at the same time, my mule got unruly; he kind of braced himself and reared and tossed his head. I was afraid I wouldn't be able to handle him.

(Testimony of Mrs. Ella W. Vogel.)

Mr. Schell: Just a moment. May this witness be admonished [149] not to volunteer information and give her own private thoughts, if the court please? I move that answer go out.

The Court: The portion of the answer where the witness said she was afraid may be stricken, and the jury is instructed to disregard it.

A. And while I was handling my own mule, just out of the corner of my eye, I saw Mr. Mateas thrown. I heard his mule buck before he threw him. I heard Mrs. Mateas scream.

Q. (By Mr. Lincoln): Before this occurred—I am sorry to have to go back a little bit—but before this occurred, when the party were having lunch, was there any talk between them about Mr. Mateas' mule?

A. It was practically the same——

Q. Wait a minute. Just tell me yes or no, please.

A. Conversation? Yes.

Q. Was Mr. Ennis there at the time that this conversation took place?

A. Yes.

Q. Did he take any part in it, do you remember?

A. Well, I don't remember the exact words he said, but I know that he heard it and they all talked about it.

Q. What was said with regard to the actions of Chiggers while Mr. Ennis was there?

A. That he acted like he wanted to buck. [150]

Q. And what else? Did anybody describe the actions that he had carried on before that time?

A. Well, everybody knew it.



(Testimony of Mrs. Ella W. Vogel.)

Mr. Schell: Just a moment. We move that answer go out as not responsive to the question.

Mr. Lincoln: I am sorry. That may go out.

The Court: Motion is granted.

Mr. Lincoln: That may go out.

The Court: You may say only what was said, what was said and done.

The Witness: Well, it is hard to remember a conversation. I know that we talked about it.

The Court: Well, the substance of it.

The Witness: But I can't say exactly what was said.

Mr. Lincoln: We do not expect you to, Mrs. Vogel, to use the exact words.

The Witness: I know that we did talk about it and that Bob was there.

Mr. Lincoln: Your witness.

### Cross-Examination

By Mr. Schell:

Q. Mrs. Vogel, you testified at the previous trial of this case, did you not? A. Yes. [151]

Q. You did not give any testimony about any of this conversation with reference to the mule that occurred at Indian Gardens, did you?

A. Well, I don't remember, but if I didn't it was because no one asked me.

Q. You were called by Mr. Lincoln at that time, were you not? A. Yes.

Q. You did not give any conversation as to anything that occurred at the trail down to Indian Gardens, did you?



(Testimony of Mrs. Ella W. Vogel.)

A. I didn't if I was not asked.

Mr. Lincoln: Just a moment, please.

The Court: Do you have an objection?

Mr. Lincoln: Yes, sir; I have. I think it has been——

The Court: No. Just state your objection, Mr. Lincoln. Argumentative, sustained.

Mr. Lincoln: We object to it as entirely incompetent and immaterial.

The Court: I sustained your objection.

Mr. Lincoln: And no proper foundation.

The Court: In that form.

Q. (By Mr. Schell): Now, Mrs. Vogel, did you observe the mule after you left the Indian Gardens?

A. Well, he didn't make much fuss until the bucking.

Mr. Schell: Just answer the questions yes or no. Did [152] you observe the mule after you left Indian Gardens?

A. Yes; I observed all the mules.

Q. Those in front of you and in back of you?

A. Yes.

Q. You turned around to look at the mules in back of you from time to time?

A. Well, they were so close, and I could hear everything that was said, and I looked, yes.

Q. You looked back from time to time?

A. Yes.

Q. Have you discussed this matter with anybody before coming into court?

(Testimony of Mrs. Ella W. Vogel.)

Mr. Lincoln: Objected to as entirely immaterial.

The Court: Overruled.

A. Well, I have told dozens of people about the injustice of it.

Q. (By Mr. Schell): The question is: Have you discussed this case with anybody before coming into court? A. Yes.

Q. Just answer that yes or no.

A. Yes; I have told lots of people about it.

Q. Counsel asked you at the start if you had any interest in the outcome of this litigation. You are very interested in the outcome, are you not?

A. Well, only as a matter of justice.

Q. You are interested to that extent? [153]

A. Yes. I think it is a shame that——

Mr. Schell: That is all.

Mr. Lincoln: Wait a minute. I submit the lady is entitled to finish her answer. May I have the balance of the answer, your Honor?

The Court: She has answered the question.

### Redirect Examination

By Mr. Lincoln:

Q. Mrs. Vogel, counsel has asked you about your testimony at the last trial. You were not asked anything about what happened going down the trail?

A. No, sir.

Mr. Schell: That is objected to now, in view of counsel's question, objection to which was sustained.

The Court: Sustained. The answer is stricken.

(Testimony of Mrs. Ella W. Vogel.)

Q. (By Mr. Lincoln): Nor were you asked anything about what happened at Indian Gardens, were you? A. That is right.

Mr. Schell: Same objection, if the court please.

Mr. Lincoln: That went through without my objection, if your Honor please.

The Court: Yes. Overruled as to Indian Gardens.

Q. (By Mr. Lincoln): Nothing was asked you about that, was it? [154] A. That is right.

Mr. Lincoln: Of course you did not testify about it. That is all.

Mr. Schell: Just a minute.

#### Recross-Examination

By Mr. Schell:

Q. You were called by Mr. Lincoln and had discussed the case with him before being called the last time?

A. No; I was not. I never discussed the case with him before the last trial.

Q. You were called by Mr. Lincoln as a witness?

A. Yes.

Q. At the last trial? A. Yes.

Mr. Schell: That is all.

The Court: Anything further?

Mr. Lincoln: That is all.

The Court: You may step down, Mrs. Vogel.

Mr. Lincoln: That is all, Mrs. Vogel. May this witness be excused, your Honor?

The Court: Is there any occasion to require the further attendance of Mrs. Vogel?

Mr. Schell: No; I think not.

The Court: You are excused from further attendance, Mrs. Vogel. [155]

Mr. Lincoln: Thank you, sir. Mrs. Mateas please.

MRS. JUNE MATEAS

called as a witness by plaintiff, being first sworn, was examined and testified as follows:

The Clerk: Please state your name.

The Witness: June Mateas.

Direct Examination

By Mr. Lincoln:

Q. Mrs. Mateas, are you related to Mr. Mateas who has just testified?

A. Yes; I am.

Q. And what relation, please?

A. He is my husband.

Q. How old are you? A. 32.

Q. So that made you 26 in 1942? A. Yes.

Q. On the 16th of June of 1942 did you and Mr. Mateas go to Grand Canyon? A. Yes.

Q. And had you been there previously?

A. Yes; we had.

Q. What year? [156] A. 1941

Q. In 1941 did you take any trips down the Bright Angel Trail? A. No; we did not.

Q. In 1942 did you take a trip down the Bright Angel Trail? A. Yes, sir.

Q. What date was it, if you remember, that you originally landed at Grand Canyon in 1942?

A. On the 16th of June.



(Testimony of Mrs. June Mateas.)

Q. What time of the day was that?

A. It was in the evening.

Q. Had you planned before then to take the trip down the Canyon? A. Yes; we had.

Q. Did you buy some tickets to take that trip?

A. Yes; we did.

Q. And where did you buy the tickets?

A. In the lobby of the Hotel El Tovar.

Q. Was that on the 16th or on the 17th?

A. It was on the evening of the 16th.

Q. Before you went into the lobby of the hotel to buy any tickets had you seen any circulars or catalogs or advertisements issued by the hotel or distributed there in the hotel? [157] A. Yes.

Q. I call your attention to Exhibit No. 2 which has been placed in evidence here, being a large folder. Was this one of those which you had seen?

A. Yes; it is.

Q. And I also call your attention to Exhibit No. 1-P which has heretofore been introduced in evidence, and ask you if that one was also one of the circulars which you had seen on the 16th?

A. Yes.

Q. On the 16th where was it that you went to buy your tickets?

A. At the accommodation desk in the El Tovar lobby. They had the little alcove set aside for tickets for excursions.

Q. Did you have any conversation there with the representative about this trip?

A. Yes, sir: I did.

(Testimony of Mrs. June Mateas.)

Q. I call your attention to a clause which occurs in a portion of Exhibit 1-P, namely, this:

“Although visitors may venture short distances down these trails on foot, the accepted mode of travel for longer journeys is via the famous ‘Grand Canyon Mules.’ These faithful, sure-footed animals, in charge of experienced guides, hold a thirty years’ record of [158] carrying many thousands of inexperienced riders down the trails and back in perfect safety.”

Did you read that before you purchased tickets?

A. Yes, sir; we did.

Q. Did you have a conversation with the person from whom you purchased the tickets with reference to that particular clause?      A. Yes.

Q. Will you tell us, please, what the conversation was as nearly as you can remember it?

A. Well, as near as I remember it, I stated at that time that my husband had not had any experience riding; and the gentleman at the desk told me that nearly all of the people who went down the Canyon had not had any experience riding; and that there hadn’t been any accidents and it would be a safely conducted ride.

Q. When you read that did you read that portion of the circular which I have just read to you?

A. Yes.

Q. And did you believe that?      A. I did.

Q. On July 17, 1942, about 11:00 o’clock in the morning, where were you and Mr. Mateas?

A. It was June 17th.

(Testimony of Mrs. June Mateas.)

Q. Pardon me, pardon me. I am sorry. [159]

A. At 11:00 o'clock in the morning we were at the corral at the head of the Bright Angel Trail.

Q. Were there any other people in the corral besides you? A. Yes; there were.

Q. Were there any mules in the corral also?

A. Yes.

Q. Did you see Mr. Bradley there? You know who Mr. Bradley is, do you? A. Yes.

Q. The gentleman who has been referred to here, Did you see Mr. Ennis there at the time, do you remember? A. Senior or Junior?

Q. Yes, Senior. A. No.

Q. You saw Mr. Ennis, Jr., or popularly known as Bob Ennis, did you? A. Yes.

Q. Did you hear any conversation between your husband and Bob before your party started out of the corral? A. Not with Bob; no, sir.

Q. With Mr. Bradley?

A. With Mr. Bradley.

Q. With Mr. Bradley. And what was that conversation, please? [160]

A. Well, my husband told Mr. Bradley that he would like to ride near me, and Mr. Bradley put him at the end of the train; and that was the conversation that took place.

Q. Going down the trail did you notice anything with regard to the mule which your husband was riding on any different from any of the other mules? A. Yes; I did.

Q. What did you see?



(Testimony of Mrs. June Mateas.)

A. Well, I would notice the mule when I would look back to see how he was doing, and I would notice the mule at different times try to pass the other two mules ahead of him.

Q. When you got down to Indian Gardens all the party stopped, I believe, and rested, is that right? A. Yes, sir.

Q. While you were there was there any conversation among the party in the presence of Bob Ennis with regard to the actions of Mr. Mateas' mule? A. During lunch time?

Q. Yes.

A. I am sorry. I didn't hear any conversation that took place at that time.

Q. All right. When the party was ready to get on the mules again did Bob Ennis assist you on your mule? A. Yes; he did. [161]

Q. Did you see him assist any of the other ladies? A. Yes.

Q. Did you notice which mule Mr. Mateas was on? A. Yes.

Q. And which was that?

A. It was the mule preceding the last mule, making it Mr. Boles' mule.

Q. Was Mr. Boles related to you or Mr. Mateas in any way? A. No.

Q. Had you ever seen him before? A. No.

Q. Ever seen his wife before? A. No, sir.

Q. Do you know where he now is?

A. I think I do; yes, sir.

Q. And where do you think he is?

A. I think he is in Ohio.



(Testimony of Mrs. June Mateas.)

Q. Anyway, so far as you know, he is not in California? A. So far as I know he is not.

Q. Or his wife, either? A. That is right.

Q. And which mule was Mr. Boles on when your husband was on Mr. Boles' mule? [162]

A. He was on my husband's mule.

Q. Did you overhear any conversation then or about that time while these two men were on these opposite mules between them and Bob?

A. Between Mr. Boles and——

Q. Just answer yes or no.

A. Oh, excuse me. Yes.

Q. Between Mr. Boles and Bob, was it?

A. Yes.

Q. And what did you overhear?

A. I overheard Mr. Boles say that the reason they had changed mules was that my husband's mule was constantly trying to pass the other mules and get ahead of them, and that he was a skittish mule and my husband was afraid of the mule; and that he thought or he knew he could ride the mule and it would be a better idea for my husband to ride his mule, Mr. Boles' mule. And that is the conversation that took place.

Q. Did Bob make any reply to that?

A. Bob told him at that time that we had to remain on the mules we were assigned at the top of the hill.

Q. And did they then change back?

A. They then changed back.

Q. You saw them do that? A. I did.

(Testimony of Mrs. June Mateas.)

Q. Sometime after that there was this accident in which your husband was involved, was there?

A. Yes, sir.

Q. Did you see that yourself?

A. Well, yes; I did.

Q. How far below Indian Gardens would you say that was in time?

A. A half an hour to an hour.

Q. And what was it that you saw?

A. Well, I saw the mule when I turned around. I heard the commotion. I heard one of the girls ahead of me scream and I turned around and I saw the mule bucking, and after about the second buck that I saw, I saw my husband go over his head, thrown over the mule's head and land on his back at the side of the trail. [164]

\* \* \* \* \*

The Court: The clerk calls my attention to the fact that it does not appear of record here that dismissals have been entered as to the fictitious defendants.

Mr. Lincoln: Oh, I am sorry, your Honor.

The Court: I assumed that that was done prior.

Mr. Lincoln: I thought that was done long ago, sir. We will ask at this time that such dismissal be made by your Honor.

The Court: Very well, the case is dismissed as to all fictitious defendants and as to all of the defendants other than the Fred Harvey Corporation. Is that correct?

Mr. Lincoln: Yes, sir. I had in mind your Honor asked us at the outset if that matter now was only as against the Harvey Company, and I assumed by that that we had complied with the proprieties in making the dismissals otherwise.

The Court: Very well. The record is now clear.

Mr. Lincoln: Thank you, sir.

The Court: And the case is dismissed as to all other defendants except Fred Harvey, a corporation. [170]

\* \* \* \* \*

Mr. Schell: That is correct. Mr. Wilson, will you come forward? I am sorry to do this.

The Court: The jury will understand that this is a witness called out of order on behalf of the defendant.

### WILL WILSON

called as a witness by defendant, being first sworn, was examined and testified as follows:

The Clerk: What is your name, sir?

The Witness: Will Wilson.

### Direct Examination

By Mr. Schell:

Q. Will you try to keep your voice up, Mr. Wilson, so that everybody can hear you?

A. Okay.

Q. Where do you live now?

A. Alameda, California.

Q. In 1942 where did you live?

(Testimony of Will Wilson.)

A. I lived at the verge of the Grand Canyon.

Q. How old are you, Mr. Wilson?

A. Well, something lacking 60.

Q. What has been your occupation?

A. Well, mostly sitting in the saddle.

Q. Doing what type of work? [184]

A. Riding.

Q. Riding?

A. Sitting in the saddle.

Q. During 1940, '41 and '42 were you working at the Grand Canyon?

A. I went to the Canyon in 1940 and left there in 1945.

Q. What type of work did you do while you were there at the Canyon?

A. I was a guide on the trail.

Q. A guide on the trail?

A. That is right.

Q. Did you have occasion to go up and down the Bright Angel Trail from time to time?

A. Well, every day, you might say.

Q. Were you acquainted with a mule called Chiggers?

A. That's right. I rode the mule quite a while, myself.

Q. You say you rode the mule. When did you ride him?

A. I rode him in '40, put him on the dude train in '40.

Q. You say you rode him?

A. Yes, sir.



(Testimony of Will Wilson.)

Q. You rode him as guide mule, did you?

A. I rode him as guide mule for a while; yes.

Q. And then, later on, you put him in the——

A. Put him in the dude string.

Q. I see. Did you use that mule from time to time?

A. From time to time is right.

Q. And can you tell us about this mule, what you noticed about his disposition and the way he acted?

A. Well, I think he was one of the gentlest mules I had on the trail.

Mr. Lincoln: I ask that the answer be stricken as not responsive and a conclusion of the witness.

The Court: Motion granted.

Q. (By Mr. Schell): As part of that using him as a guide mule was that part of his training?

A. Yes; that's right.

Q. As a guide mule was he gentle or otherwise?

A. He was very gentle.

Mr. Lincoln: Objected to—pardon me. Objected to as no foundation, calling for a conclusion of the witness, incompetent, irrelevant and immaterial.

The Court: Overruled. The answer may stand.

Q. (By Mr. Schell): Then when you put him on the dude string what did you find about his actions?

A. Well, he was still perfectly gentle to men, women, children and all of them.

Q. In using him as a guide mule did you always use [186] him in the same position on the string or was he in different positions?

(Testimony of Will Wilson.)

A. We put him out just as he came. If there was a lady on him, we put him out in the front of the men; if there was a man on him, we put him back of the women; no one place for the mule to work.

Q. During the time that you were working, say, up to '42, was he sometimes on the end of the string?

A. Yes, sir.

Q. And on various places in the string, is that right?      A. That is right.

Q. Did you ever have any trouble with this mule at any time while using him?

A. No trouble whatever.

Mr. Schell: That is all. Wait just a minute. Just a minute, Mr. Wilson. Mr. Lincoln may want to ask you some questions.

### Cross-Examination

By Mr. Lincoln:

Q. Mr. Wilson, really, this mule was one of the gentlest and kindest and simplest little mules you had?

A. That is what I found the mule to be with me.

Q. What, sir?

A. That is what I found the mule to be with me.

Q. Kind of a pet, wasn't it?

A. He was very much of a pet.

Q. And you really used this mule more to have ladies ride on him, didn't you, than you had men?

A. We had ladies and men and all. We used him more as a guide to lead them on.

(Testimony of Will Wilson.)

Q. You did not select any particular mule for any particular person, did you?

A. Well, at times I did and at times I didn't. We generally selected certain mules for women.

Q. Pardon, sir?

A. Sometimes we selected certain mules for children and women, and it depended on the ages of the women and children.

Q. And at those times you would select this particular mule because of his gentleness, wouldn't you?

A. That is one reason; yes.

Mr. Lincoln: That is all.

### Redirect Examination

By Mr. Schell:

Q. By the way, may I ask a couple of questions I overlooked? Mr. Wilson, are you familiar with the equipment that these mules had on?

A. Well, I should be; yes. [188]

Q. What was it?

A. Well, it would be a saddle, saddle packs, raincoats, and bridles and halters.

Q. And did the bridles have reins on them?

A. They certainly did.

Q. And what instructions, if any, were given to the people who rode them?

A. I asked everybody not to ride sideways and keep the mules up close together.

The Court: Just a moment.

Mr. Lincoln: May the answer go out, your Honor, until I object?

The Court: The answer will be stricken.

(Testimony of Will Wilson.)

Mr. Lincoln: We would object to that as incompetent, irrelevant and immaterial, for this particular reason: As I see it, what may have been the custom heretofore is not a matter which is before this court at the present time.

The Court: The objection will be sustained to the question in that form, it not indicating any particular time.

Q. (By Mr. Schell): During the year of 1942 and prior thereto, state whether or not it was the custom of the guides to have the dudes hold the reins? A. That is right.

Mr. Lincoln: Well, wait a minute. We will object to that as being entirely incompetent for the particular [189] reason, as I understand it, that this gentleman had ceased to ride this particular mule in that particular year, and we still are not concerned with custom unless it could be shown that he had knowledge of the customs.

Mr. Schell: I do not think that is true, your Honor.

The Court: Is your question directed to all mules?

Mr. Schell: To the entire course of conduct of mules, yes, all mules.

Mr. Lincoln: For that reason we submit it is still more incompetent.

The Court: Objection overruled. Do you understand he is questioning you about the custom with respect to all mules?



(Testimony of Will Wilson.)

The Witness: All mules, all trail mules, all of them.

The Court: Were all people who rode all the mules——

The Witness: That's right.

The Court: ——in 1942 instructed to hold the reins?

The Witness: That's right, because I instructed them to hold the reins in your hand.

Q. (By Mr. Schell): What is the purpose of that?

A. Well, the mule might stumble and it would help the mule to kind of pick his head up; in other words, the mule could jump and you could pull up on your reins.

Q. Are the mules shod?           A. Yes, sir.

Q. What is the general nature of the trail?

A. Well, it is just a little bit rocky.

Q. Rocky?           A. A little bit rough.

Q. And state whether or not the saddles and so forth squeak as the riding goes on?

A. That's right; they do.

Q. From your experience, are you able to hear conversation any distance back of you when you were riding down the trail?

A. Not too far back. The first person can take my conversation and then relay it back, but you cannot hear the conversations in the back of a party.

(Testimony of Will Wilson.)

Two mules back and you can't hear what the person says on that trail, unless you are on a switch back and they come up over you.

Mr. Schell: That is all.

The Court: Any further questions?

Mr. Lincoln: Just a minute. Yes, sir.

The Court: Just a moment, Mr. Wilson.

The Witness: More?

### Recross-Examination

By Mr. Lincoln:

Q. How many people would you say you have taken down that trail? [191]

A. Well, I didn't keep count of them. I guided 10 practically every day I worked there for five years.

Q. Every day including Sunday?

A. We didn't have no Sunday.

Q. You did not drive them on Sunday?

A. We didn't have no Sunday. We worked all days.

Q. That is what I mean, seven days a week?

A. And we worked at night.

Q. Seven days a week?

A. That is right. It would be eight days a week anyway you figure it.

Q. So, then, you would take at least 70 people up or down every week, is that right?

A. That is right.

(Testimony of Will Wilson.)

Q. For a period of two years, is that right?

A. For five years.

Q. Five years, which would make something like 18,000 people, if my arithmetic is correct.

A. It might be something like that.

Q. And how many times did you take this mule Chiggers down there?

A. Well, I couldn't count the exact time, but I had him from time to time, from the time I started in until after I left there, after he went into the dude string.

Q. Did you have him in the dude string for a period [192] of two years?

A. Well, yes, sir. He had been on the dude string for five years.

Q. For five years. Of course, you did not use him, I suppose, every time you went down, did you?

A. Not every day.

Q. Pardon?

A. Not every day, no; but somebody else did.

Q. Oh, somebody else did?

A. That is right, or I did.

Q. He was used every single day, is that right?

A. That is right.

Q. When these people hold the reins tight, that is, as I understand it, for the purpose of holding up the mule in case he stumbles, is that right?

A. It helps; yes.

Mr. Schell: Objected to as assuming something not in evidence.

The Witness: I didn't say "tight." I said, "hold them in your hand."

(Testimony of Will Wilson.)

Q. (By Mr. Lincoln): Oh, "just hold them in your hand"? A. That is right.

Q. But you did not mean to hold them tight?

A. I didn't mean to hold them tight. If we do, the mules can't travel. [193]

Q. You are not supposed to hold them tight, is that right? A. That is right.

Mr. Lincoln: Would you read the question?

The Court: Please read the question, Mr. Reporter.

(Question read by the reporter.)

A. That is right; just hold them in your hand, I told them.

Q. (By Mr. Lincoln): What would happen if you did hold them tight?

A. Well, the mule can't travel on tight reins.

Q. Can't go at all?

A. That would stop the mule.

Q. I see. So you told them simply to hold the reins loose on the saddle, is that right?

A. That is right; "hold them in your hand; keep them in your hand."

Mr. Lincoln: "Keep them in your hand." That is all.

Mr. Schell: That is all. You say step down. May Mr. Wilson be excused?

Mr. Lincoln: As far as I am concerned, yes.

The Court: You are excused from further attendance, Mr. Wilson. Do you desire to recall Mrs. Mateas now?

Mr. Lincoln: Yes. And, if your Honor will bear with me just a moment. [194]



## JUNE MATEAS

recalled.

## Direct Examination

(Resumed)

By Mr. Lincoln:

Q. Mrs. Mateas, I show you this Exhibit No. H, which is the document which was supposed to have been written at the hospital about the 6th of July, 1942, and ask you if you ever saw that document before yesterday?

A. This particular document?

Q. Yes. A. Not this particular document.

Q. Did you ever see one like it before yesterday?

A. I can't say whether I saw one like it, Mr. Lincoln, as to color and content.

Q. But you saw something you think that was like it? A. I saw something.

Q. And where was the something which you speak of now that you saw, for the first time?

A. A representative of the Harvey Company had it in his hands.

Q. I see. And about when was that that this representative of the Harvey Company had this paper of some kind in his hand?

A. During the time we were at the Grand Canyon Hospital. [195]

Q. When was that, do you remember, with reference to the time of the accident itself?

A. I would say a week or a week and a half after the accident, roughly speaking.

Q. What time of day was it?

A. It was in the afternoon.

(Testimony of June Mateas.)

Q. What was Mr. Mateas' condition that afternoon?

Mr. Schell: That is objected to as calling for a conclusion and speculation, no foundation laid, and no definite time fixed.

The Court: Sustained in that form.

Q. (By Mr. Lincoln): What had Mr. Mateas done that morning, if you know?

A. That morning he had been trying to learn to walk again.

Q. Could you tell us whether that was tiring to him?

A. It was very tiring to him. He would have to go back to bed.

Q. Were you with him when he was attempting to walk?

A. Oh, yes; I would have to help him.

Q. You were there with him every day during the daytime, at any event, were you?

A. I was there all day and that night; yes, sir.

Q. And when this representative came there was Mr. Mateas sitting up or walking or where was he? [196]

A. He was in bed.

Q. What did this representative say when he first came there, if you remember?

Mr. Schell: That is objected to as incompetent, irrelevant and immaterial, not within the issues.

Mr. Lincoln: I respectfully submit——

The Court: Overruled.

Mr. Lincoln: Pardon, sir?

The Court: Overruled.

(Testimony of June Mateas.)

The Witness: Will you repeat the question, please?

(Question read by the reporter.)

A. In substance, he said he was a representative of the Harvey Company and he wanted to get an account of the accident, and that undoubtedly the Harvey Company would make some sort of a settlement. And I think that was the substance.

Q. (By Mr. Lincoln): Then did he ask questions of you and Mr. Mateas? A. Yes; he did.

Q. Which one of you? Was it you or Mr. Mateas that gave the answers?

A. It was Mr. Mateas that gave the answers.

Q. And then what would this representative do when he received those answers?

A. He wrote them down. [197]

Q. Did you see what he was writing at any time?

A. No; I did not.

Q. Did you read any of the writing at any time?

A. I did not.

Q. And did you see Mr. Mateas read any of that writing at any time? A. No, sir.

Q. Did this representative read over this writing at any time? A. To us?

Q. Yes.

A. Yes; he read something back to us.

Q. He read something? A. Yes.

Q. Did he give you a copy of the writing?

A. He did not.

Q. Did you ask him for a copy?

A. Yes, sir; we did.

(Testimony of June Mateas.)

Q. And what answer did he make to that?

A. He said it was not necessary for us to receive a copy of what he had written down.

Q. Any particular reason given for that?

A. He said it would be—he said he was going to turn it in to the Harvey Company and, as I stated before, they would contact us to make a settlement off of his report. [198]

Q. You believed that, did you?

A. Yes; I did.

Q. Now, Mrs. Mateas, will you be good enough to read that exhibit which I have just presented to you and tell me if you find anything in there which was not said by either Mr. Matheas or yourself to this representative of the Harvey Company?

A. I have read it.

Q. Before you answer that question, Mrs. Mateas, may I ask you this: Is this the first time you ever read that document?

A. The first time I have ever read it; yes.

Q. Now, do you find anything in there which either Mr. Mateas or you did not tell the investigator of the Harvey Company at the time that he wrote something down on a piece of paper?

A. Yes; I do.

Q. And what page do you find that on?

A. It is on the third page.

Q. Would you be kind enough to read that portion which you discover was not read or was not overheard by you—no. Let me withdraw that for a moment. When the investigator read this over,



(Testimony of June Mateas.)

do you see any portion in there which you remember he did not read?      A. Yes; I do. [199]

Q. And that is the same portion which you are now referring to, is it?      A. Yes.

Q. Will you be good enough to read that, please?

A. It states here: "I did not say anything to the guide that I would like to ride this mule, and I do not know if the other man said anything to the guide." I believe that is just two sentences.

Q. Have you and Mr. Mateas been living together all the time since 1942?      A. Yes, sir.

Q. And still are?      A. Yes, sir.

Q. During that time and after he came back from the Grand Canyon what was done in Los Angeles or any treatment which may have been given to him for the injury?

A. He had his back strapped before we left the Canyon, and at the time we came to Los Angeles he underwent a series of diathermy treatments and prescribed rest.

Q. What physician attended him at that time?

A. Dr. Sloan.

Mr. Lincoln: Mr. Reporter, that is Leigh, L-e-i-g-h, Dr. Leigh Sloan.

Q. And about how long did Dr. Sloan's treatment continue? [200]

A. About six to eight weeks.

Q. What do you find Mr. Mateas' condition to be at the present time?

A. His condition at the present time——

(Testimony of June Mateas.)

Mr. Schell: Just a moment. That is objected to as no foundation laid, if the court please, calling for a conclusion of a lay witness.

The Court: Sustained in that form.

Q. (By Mr. Lincoln): What have you observed with relation to how Mr. Mateas acts or reacts at the present time?

A. He still suffers pain as a result of his injury.

Mr. Schell: I move that answer go out, if the court please, as a conclusion.

The Court: Do you mean he appears to suffer pain?

The Witness: Yes, sir; he does.

Q. (By Mr. Lincoln): Does he complain to you?

A. He complains to me; yes, sir, he does.

Q. And does he say what particular portion of his body that that pain is in?

A. He complains of his back and of his right hip at different times, at different intervals; and I have seen instances of happenings that have occurred since his back injury. He would try to bend over and would get bent over and couldn't get back up. [201]

The Court: Motion denied.

Mr. Schell: Mrs. Mateas——

Mr. Lincoln: If you will pardon me?

Mr. Schell: Oh, certainly.

Mr. Lincoln: Just one question.

Q. Mrs. Mateas, did the Harvey Company make a settlement with either you or Mr. Mateas?

A. No, sir; they did not.

(Testimony of June Mateas.)

Q. Did they make any offer of settlement to either of you? A. No, sir.

Mr. Schell: Just a moment. We object to that as improper and ask that the court fully instruct the jury.

The Court: The jury is instructed to disregard the witness's answer to the last question. Do you desire any further instruction be given the jury?

Mr. Schell: That it has no place in the case at all and should not be considered in any way at all.

The Court: As to whether or not the Harvey Company offered any settlement to the plaintiff in this case has no place here. You are instructed to disregard any testimony or any questions or answers relating to that question. [202]

### Cross-Examination

By Mr. Schell:

Q. Mrs. Mateas, you testified yesterday about a conversation regarding the mule with the guide that you overheard at the water trough, is that right? A. That is right.

Q. And that is the only conversation you heard with reference to the mule and the change from one mule to the other? A. Yes, sir.

Q. It occurred at the water trough?

A. At the water trough.

Q. And that was a conversation at the time when Mr. Mateas was on the other mule, is that right? A. That is correct.

(Testimony of June Mateas.)

Q. How far had you ridden to go to the water trough?      A. We mounted at the water trough.

Q. You mounted at the water trough?

A. Yes, sir.

Q. And this conversation took place after that mounting, is that right?      A. Yes, sir.

Q. Mrs. Mateas, do you remember testifying at the previous trial of this matter?      A. I do.

The Court: You may show it to the witness.

Q. (By Mr. Schell): Calling your attention to page 50, commencing with line 15 down to line 10 on page 51, will you read that to yourself? Have you read it?      A. Yes, sir.

Q. Did you so testify?      A. Yes, sir; I did.

Mr. Schell: May I read it now, if the court please?

The Court: You may.

Mr. Schell:

“Q. But in any event, there you had lunch and stopped for a little while?

“A. That is right.

“Q. When you went on from there did anything happen with relation to Mr. Mateas and the mule?

“A. Well, at the water trough we stopped to water the mules.

“Q. Yes.

“A. And he got onto another man's mule that was there and the guide made him exchange mules, and then when we proceeded, his mule tried to get ahead of the rest of ours.



(Testimony of June Mateas.)

“Q. Now just a minute. At the water trough when they exchanged the mules did you have any conversation with the guide or hear any conversation between [204] him and Mr. Mateas? A. No.

“Q. All right. And so they exchanged mules, and then did they exchange them back again?

“A. Yes. The guide told them to revert to their original mules.

“Q. Well, then, after that, what happened?

“A. Well, then we proceeded down the trail towards the bottom of the Canyon.”

You so testified, did you? A. I so testified.

Q. Mrs. Mateas, you have been asked some questions with reference to the document which is in front of you. I think it is marked Exhibit H. May I approach, please?

The Court: You may.

Q. (By Mr. Schell): You have now read that document completely, have you? A. Yes, sir.

Q. And the statements on the first page of statements are correct? A. Yes, sir.

Q. And that is Mr. Mateas' signature that appears on the bottom of that first page?

A. Yes, sir.

Q. Now, you read the second page? [205]

A. Yes, sir.

Q. The statements on there are correct?

A. Yes, sir.

(Testimony of June Mateas.)

Q. That is the information that was given at that time to the man who wrote it down?

A. Yes, sir.

Q. And the signature of Mr. Mateas on the bottom of that page is his signature?

A. Yes, sir.

Q. "Elmer Mateas"? A. That is right.

Q. "Elmer H. Mateas," I believe it is?

A. Yes; that is right.

Q. Now, going to the third page, you say that on the part that was not stated, was not read back, are two sentences? A. Yes, sir.

Q. Starting with "I did not say anything to the guide that I would like to ride the mule, and I do not know if the other man said anything to the guide," is that right? A. That is right.

Q. That is just really one sentence, isn't it? There is no period there.

A. That is right. No; that is a comma.

Q. With the exception of that sentence, did you give [206] the information or Mr. Mateas give the information contained on that page?

A. Yes, sir.

Q. And that is likewise his signature at the bottom of that page, "Elmer H. Mateas"?

A. Yes, sir.

Q. Now, with the fourth page, is the information on that page correct? A. Yes, sir.

Q. And that is Mr. Mateas' signature, "Elmer H. Mateas," on the bottom of that page?

A. Yes, sir.

(Testimony of June Mateas.)

Q. With reference to the fifth page, is the information on that page correct? A. Yes, sir.

Q. And that is Mr. Mateas' signature on the bottom of that page? A. Yes, sir.

Q. "Elmer H. Mateas"? A. That is right.

Q. And on the sixth and last page, in the information on that page information you gave or Mr. Mateas gave this gentleman at the time?

A. Yes, sir.

Q. Is that correct? [207] A. Yes, sir.

Q. And is that the signature of "Elmer H. Mateas" at the bottom? A. Yes, sir.

Q. You were present, Mrs. Mateas, at all times while this statement was being taken?

A. Yes, sir; I was.

Q. And it was written out there at that time in pen and ink in your presence? A. Yes, sir.

Q. And the statement was then handed to Mr. Mateas, was it not? A. It was read to him.

Q. It was read to him but it was not handed to him? A. Not at that time.

Q. Was it handed to him at any later time?

A. After it was read to him it was handed to him; yes, sir.

Q. Now, did you see Mr. Mateas sign each and every page at that time? A. I did.

Q. Do you know whether or not Mr. Mateas was in the habit of signing documents he did not read?

Mr. Lincoln: We will object to that as entirely immaterial. [208]

The Court: Sustained.

(Testimony of June Mateas.)

Q. (By Mr. Schell): When is it that you asked for a copy of this document? A. At that time.

Q. Before Mr. Mateas signed it?

A. Yes, sir.

Mr. Schell: That is all.

The Court: Have you any further questions?

Mr. Schell: I think not. Just a moment. That is all.

Redirect Examination

By Mr. Lincoln:

Q. Mrs. Mateas, had Mr. Mateas signed this document before it was handed to him, as you have described? A. Before it was handed to him?

Q. Yes. I understand your testimony to be that this representative of the Harvey Company read over something to you and then he handed this paper to Mr. Mateas.

A. He placed it on a bedside table. It was not handed directly to Mr. Mateas. It was placed on a beside table for his signature.

Q. What did the representative then say with relation to the signature?

A. He said it was just a matter of form, I believe. He said, "Either initial or sign the pages."

Q. Did Mr. Mateas read over the document before he signed it? A. No, sir; he did not.

Mr. Lincoln: That is all.

Mr. Schell: Just one second, if the court please. Might I suggest, possibly we have the recess now, if your Honor please? It will take me a little time to find something.



(Testimony of June Mateas.)

The Court: Do you have further questions of this witness?

Mr. Schell: Yes; I have one or two further questions.

The Court: Very well, we will take the morning recess at this time, ladies and gentlemen of the jury.

(The court admonished the jury.)

You are now excused for a five-minute recess. You may step down.

(Short recess.)

The Court: Is it stipulated, gentlemen, that the jurors are all in their places?

Mr. Lincoln: Yes, sir.

Mr. Schell: So stipulated.

The Court: You may proceed. [210]

#### Recross-Examination

By Mr. Schell:

Q. Mrs. Mateas, do you remember distinctly all the conversation that took place back in '42 between yourself, Mr. Mateas, and this representative of the Harvey Company? A. Word for word?

Q. The substance of it. Just answer that yes or no, please. Do you remember distinctly or not?

A. You are asking me in substance?

Q. Yes. A. Yes.

Q. You remember the substance of all of the things that were in the statement, with the exception of that one sentence, as having been said?

A. Yes.

(Testimony of June Mateas.)

Q. To your knowledge, did Mr. Mateas ever receive a previous injury?      A. To his back?

Q. Any previous injury in an accident.

A. In an accident?

Q. Yes.      A. No, sir.

Q. Isn't it a fact that he was plaintiff in some litigation involving injuries received in an automobile accident? [211]

A. Not personal injuries; no, sir.

Q. Not personal injuries?

A. Not to my knowledge; no, sir.

Mr. Schell: That is all.

The Court: Have you any further questions?

Mr. Lincoln: Yes. May I, just one question, your Honor?

Redirect Examination

By Mr. Lincoln:

Q. Mrs. Mateas, Mr. Schell asked you with reference to your testimony in the former case, in which he read to you this testimony, saying that you did not have any conversation with the guide or hear any conversation between him and Mr. Mateas; and I believe you said that was correct and that was your testimony?      A. That is correct.

Q. Did you hear any conversation between the guide and any other person at that time, that is, at the time when you were down there at the watering trough and the mules were being exchanged?      A. I did.

Q. And who was the other person?

A. The conversation was with Mr. Boles and Bob Ennis. [212]

Mr. Lincoln: And the guide.

(Testimony of June Mateas.)

Q. (By Mr. Schell): You did not mention that conversation at the time that these questions were asked of you in the other case, did you?

A. I was not asked. No, sir.

Mr. Schell: That is all.

Q. (By Mr. Lincoln): That particular question was not asked you in the other case, was it?

A. It was not.

Mr. Lincoln: That is all.

The Court: Do any members of the jury have any questions? You may step down.

### MRS. ALICE RAYLE

called as a witness by the plaintiff, being first sworn, was examined and testified as follows:

The Clerk: Please state your name.

The Witness: Alice Rayle, Mrs. Alice Rayle.

The Clerk: Will you spell your last name, please?

The Witness: R-a-y-l-e.

### Direct Examination

By Mr. Lincoln:

Q. Where do you live, Mrs. Rayle?

A. In San Marino. [213]

Q. Pardon? A. In San Marino.

Q. I am sorry. Will you speak up just about as loud as you can? This lady at the end and this gentleman at the end cannot hear you very well unless you do speak up quite loud. Thank you.

Do you know Mrs. Mateas who has just testified?

A. Yes, sir.

(Testimony of Mrs. Alice Rayle.)

Q. And you know Mr. Mateas who sits here?

A. Yes, sir.

Q. Are you related to either of them in any way?

A. No, sir.

Q. When did you first meet either of them?

A. At the time at the corral when we were getting ready to mount the mules.

Q. In 1942 was that?

A. Yes.

Q. Was that the time of the injury to Mr. Mateas?

A. Yes.

Q. Were you a member of that party who went down the Bright Angel Trail that day?

A. Yes, sir.

Q. I show you this photograph which has been placed in evidence as No. 4 and ask you, please, if you recognize that as being a photograph of anything that you remember? [214]

A. Well, that is a photograph of the party that went down the trail together of which I was a member.

Q. Do you find your picture in that photograph?

A. Yes, sir.

Q. And which one are you, please?

A. I am the one in back of Bob Ennis, the rider.

Q. Immediately. Then you were the first dude, if I may use the expression, in the party?

A. Yes, sir.

Q. Do you remember when the party got down to Indian Gardens that day?

A. Yes, sir.

Q. And did it stop then for lunch at that time?

A. Yes, sir.



(Testimony of Mrs. Alice Rayle.)

Q. After lunch and as the party were about to resume their journey did anybody assist you in mounting your mule?

A. Well, I believe—I am not sure. I don't remember whether we needed assistance or not.

Q. Do you remember whether the guide assisted any of the other ladies in mounting their respective mules? A. I don't recall.

Q. You know Mr. Boles, do you, who was a member of the party? A. Yes, sir.

Q. Do you remember whether or not Mr. Boles got on [215] the same mule that he had ridden down? A. I remember that he did not.

Q. And do you remember whether Mr. Mateas got on the same mule which he had ridden down?

A. No; he didn't.

Q. They were on different mules, were they?

A. Yes.

Q. Did you overhear at that time, that is, at the time they were on these different mules, any conversation between either Mr. Mateas or Mr. Boles with Bob Ennis, the guide? A. Yes, sir.

Q. Do you remember whether it was Mr. Mateas or Mr. Boles who talked with the guide?

A. Mr. Boles.

Q. Mr. Boles. Do you remember what the conversation was? I do not mean, of course, Mrs. Rayle, the exact words, but, as you can remember, perhaps the substance of what their conversation was?

(Testimony of Mrs. Alice Rayle.)

A. Just the substance would be the reason for their changing the mules; that the mule Mr. Mateas rode bothered him, and Mr. Boles wanted to change with him, and they did that at Mr. Boles' suggestion.

Q. Did you hear any answer given to that by Mr. Ennis? [216]

A. Well, Mr. Ennis made them resume their own mounts that they had when they originally left the trail.

Q. Do you remember what he said, what his words were or the substance of the words?

A. Well, the substance would be that they have to go down, continue the trail on the mules on which they started.

Q. Did Mr. Boles give some reason for the changeover?

Mr. Schell: Just a moment. We object to that as leading and suggestive. I submit the question has already been asked and answered.

Mr. Lincoln: I am sorry. We withdraw that question.

Q. Did Mr. Mateas participate in that conversation, do you remember?

A. I don't remember.

Q. Have you given us now all of the conversation which you can remember, particularly that on the part of Mr. Boles?

A. I believe so. It all had to do just with the reason for their changing.

Mr. Lincoln: That is all. Your witness.

Mr. Schell: No questions.

The Court: You may step down, Mrs. Rayle.

Mr. Lincoln: May this witness be excused, your Honor?

Mr. Schell: So stipulated. [217]

The Court: You are excused from further attendance.

Mr. Lincoln: Thank your Honor very much. I find myself, your Honor, in the predicament of not having any further witnesses at hand. My reason for that—oh, yes, Dr. Cox. I am sorry. Dr. Cox, will you come forward, please? Thank you, Mr. Schell. [218]

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### EMMETT MYRON ENNIS

called as a witness by defendant, having been previously sworn, was examined and testified as follows:

The Clerk: You were sworn the other day, were you not?

The Witness: Yes, sir.

The Clerk: Just be seated.

### Direct Examination

By Mr. Schell:

Q. Mr. Ennis, you have a son, Bob Ennis?

A. I do.

Q. How old is he now?                      A. 23 years old.

Q. Do you know whether or not Bob was the guide on the trip that Mr. Mateas was on?

A. He was.

(Testimony of Emmett Myron Ennis.)

Q. How long had Bob lived at the Canyon at that time?      A. He was born there.

Q. During the early part of his life where did he live?      A. At the Grand Canyon. [252]

Q. Do you know of your own knowledge that he had been up and down that trail many times?

A. Many, many times.

Q. Do you remember about when he first went up and down that trail?

A. The first time he went down the trail he was three years old. I put him on mule and took him down the Canyon. My mule wouldn't walk so I put him in front of him. He looked back over his shoulder and he said, "Ha! I am a guide, Dad."

Q. Thereafter did he go back and forth down that trail with mules?

A. He was backwards and forwards with the guides any time that there was a vacant mule with the guides from the time he was six years old on. The guide would take him with him.

Q. Then did he start taking parties down as a guide on his own later on?      A. In 1941.

Q. 1941. And where did he do his——

A. Oh, I would say 1940 on or 1941. 1941, that is when he went on the payroll.

Q. That is when he went on the payroll?

A. Yes, sir.

Q. And do you know where he did his work at that [253] time in 1941?



(Testimony of Emmett Myron Ennis.)

A. At the Bright Angel and down the Kaibab Trail.

Q. Was he on the north rim in 1941?

A. No. He was on the north rim in 1940.

Q. And there are two trails. Is there a trail also from the north rim down to the bottom of the Canyon?

A. The Kaibab Trail is a cross-connection trail. It comes from the south to the north rim or vice versa from the north to the south rim.

Q. In other words, you call the whole trail from one side to the other the Kaibab, is that right?

A. That is right.

Q. Then during the time from the time he went on the payroll in 1941 up to June 17th did he do regular guide work?

A. He guided during his school vacation.

Q. I take it there are more people going down in the summertime, more tourists, than there are in the winter, is that right?

A. That is right.

Mr. Schell: That is all.

Mr. Lincoln: No questions.

The Court: You may step down, Mr. Ennis.

Mr. Schell: Mr. Bradley. [254]

JOHN DAVIS BRADLEY

called as a witness by defendant, being first sworn,  
was examined and testified as follows:

The Clerk: Please state your name.

The Witness: John Davis Bradley.

Direct Examination

By Mr. Schell:

Q. Mr. Bradley, where do you live?

A. In the Grand Canyon, Arizona, National  
Park.

Q. How old are you? A. 38.

Q. By whom are you employed?

A. By Fred Harvey Transportation Company.

Q. How long have you been so employed?

A. Since July 13, 1933.

Q. Were you working there at the Grand Canyon for Fred Harvey in June of 1942?

A. Yes, sir.

Q. What was your position there at that time?

A. Trail foreman.

Q. A little louder. A. Trail foreman.

Q. As such did you have charge of the stables or corrals in which the animals were kept? [255]

A. Yes, sir; I had charge of all riding and packing stock, along with the guide and the men that worked for me.

Q. How long had you had that position?

A. Since '36 in the first of April.

Q. Had you had any experience with animals before going to work for Fred Harvey?

A. It has been my life's work; yes, sir.

(Testimony of John Davis Bradley.)

Q. And did you have experience particularly with mules? A. Yes, sir.

Q. About how many years' experience had you had with the handling of mules prior to 1942?

A. Well, I could accurately say since I was 12 years old. That is when I went to making a hand for myself.

Q. Can you tell us when this mule Chiggers was acquired? A. In 1938.

Q. Do you know where he came from?

A. From Wichita, Kansas, I believe.

Q. What course of training did Chiggers have?

A. He had the same course of training as all the stock have, in general. As he was purchased along with 25 others in a carload, and had the same training as the balance of the car. [256]

Mr. Lincoln: I ask that the answer go out as not responsive.

The Court: Motion granted.

Q. (By Mr. Schell): What was that training, Mr. Bradley? How are they started? What do you do with them?

A. Well, we first catch them in our corrals in town. I mean by that, that the Kaibab Trail is something like three and one-half miles east of the village where our pack trains are. We first ship these mules into the village, where we catch them up and name them, tie them all up and more or less learn them to lead, be halter-broken, in other words; and from there they are taken to the pack train.

(Testimony of John Davis Bradley.)

We always, when we have that many at one time to break, we have several men to work with them.

In that course of work they are first usually taken down the trail with nothing more on them than just the pack saddle, without anything tied to it whatsoever, unless it might be a piece of canvas or something that would flop around, no weight. Then they are worked in that manner until they have built their muscles up to the point where they can make the trail. Sometimes they only go down in that first trip. By that time they have begun to tremble, you know, and they are left over until the following day and brought up again. That is repeated until these particular animals can negotiate the trip down and back. Then we [257] start putting weight on them, which is usually started light because this animal has always got to built his strength up to the job, the same as a person would going into any strenuous work. We built this weight up to the point where the animal can go down and back in a day's time, carrying the approximate weight of a man, which our weight limits are around 200 pounds, and we never pack over that. And so, whenever he can pack that weight or up to that, the guides or packers, that is, they are sometimes guides put out on that work, they start riding them.

Now, they will sometimes ride this animal, they will take him to the ranch, packed. Ordinarily they will saddle him, his first ride to the saddle



(Testimony of John Davis Bradley.)

there at Phantom Ranch. Then he will ride him half way out, then change their saddle to another animal and ride him the rest of the distance. They go through with that until the animal has gotten to where the packer or guide can properly handle him, handle his other pack mules, and then he will start riding him from the job and ride him down and back, or that is up to the individual packer or guide, whichever he sees fit. He is usually sixth in a one-man string, after they are broken to the point that he can handle them. Six is a man's string in a pack train. Then he will take this string of mules and alternate, riding and packing them, until he has any individual one or more in his string that he determines a guide can handle himself with a party safely, that is, so the guide can handle him to the point that he is not endangering the party.

At that time we bring this animal into the village, put him in our barns with the other mules, and a guide is assigned to him to ride him. Then at times, to get them used to different people, the guides will all switch mules; that is by orders usually from myself. As mules and horses, as you may know, some of them are inclined to be a one-man animal if handled by one man too long, therefore, that is the procedure that all of these animals go through. They are not handled too long by any one individual of our employees.

Q. After they have been ridden by the guide for sometime when is it decided whether they go into the dude string or not and who decides that?

(Testimony of John Davis Bradley.)

A. Well, the guides that is riding them as a guide mule; and, of course, during that time, as the people all carry slickers on their saddles, so does the guide, and during the time he is riding him he is instructed to use his slicker when necessary, and a lot of times when not necessary, to get this animal used to the same. Then when he thinks that, in our terms, the mule is foolproof, why, he usually tells me that the mule is ready to pack a guest. Then the usual routine that is gone through on that, the [259] guide will ride this mule, say, on the one-day trip to the river, but on the way back, in accordance if he notices some particular rider in his party that he thinks is quite capable, he will talk to him and ask him if he or she would care to ride this particular mule; and if they care to do so—that is usually a lady, if possible, because the ladies usually are always in the front of the party—then the guide will put this particular lady on the mule and put her directly behind him, where, if she should need any attention whatsoever, he is there immediately to help her.

The mule is worked in that manner until the guide and myself is absolutely assured that the mule is ready to take his place in the string, which means that from that time he will work in any position that he might be loaded out of the corral in. That does not have any particular place in the string.

Q. Do your mules afterwards have any particular place in the string or are they put anywhere you happen to put them?

(Testimony of John Davis Bradley.)

A. They have no particular place in the string. I might add that the only way that that can be decided is, of course, that if a small child is loaded on one of them or a lady or some lady that is particularly scared or that we think might have the tendency to get faint on the trip, if she is put on any one of the individual mules, he is put next [260] to the guide or as close as possible. We try to load them out in accordance to what we think the people need most attention and in accordance with what they are mounted on.

Q. Insofar as Chiggers is concerned have you ridden him personally or had you prior to 1942?

A. I have. At the time Chiggers came to the Canyon, at the time that car of mules came to the Canyon, I personally went to the pack train and assisted the packers in starting that car of mules.

Q. Did you have anything to do with Chiggers in that following two years, also, up to 1940?

A. Yes; all the time up to 1940; and, in fact, since he came there until the present.

Q. Did you ever ride him personally?

A. I have ridden him many times; yes, sir.

Q. In your handling of him, say, up to 1942, what did you see about the mule at all as far as his conduct is concerned when you had him?

Mr. Lincoln: Objected to as incompetent, irrelevant and immaterial.

The Court: Overruled.

Mr. Schell: You may answer. Did you get the question?



(Testimony of John Davis Bradley.)

The Witness: May I have it again, please?

Mr. Schell: Will you please read it? [261]

The Court: Will you read it please, Mr. Reporter?

(Question read by the reporter.)

A. This mule Chiggers has a very decidedly gentle conduct. He has been that way ever since he arrived in that car of mules. That does not imply that he is the only one, because we have many of such mules out of 127 that we have at this time.

Q. In other words, some are exceedingly gentle and affectionate, so to speak?

A. That is right. We find that quite often in the disposition of mules, as well as you find some of them that are very wild, still you find a good many of them that are very affectionate and gentle. He happened to be one of this type of mules, which anyone knows those mules usually take shorter training than the wilder ones, naturally.

The Court: How old are the mules, usually, when you put them into service?

The Witness: From three—I would say from three to eight years old.

The Court: How long would you work them in the service, about how many years?

The Witness: That depends entirely on the way the individual animal stands up to the work, sir. I would say an average of 15 years.

The Court: An average of 15 years? [262]

The Witness: An average of 15 years; yes.

Q. (By Mr. Schell): By the way, are all these mules that go on the trail shod? A. They are.



(Testimony of John Davis Bradley.)

Q. What kind of shoes do they have on them?

A. They wear what we call a smooth shoe, just cold shoe that has to be worked by the forge. Of course, it is not the light cowboy shoe that can be worked cold. It is a forged shoe. It is smooth, without any corrugations on it whatsoever. It is just a flat, smooth shoe, steel.

Q. In taking these mules up and down the Canyon do they make a noise or not as they walk along?

A. Yes, sir. We have a party of, say, five to maybe the full party of 10, and the trail, naturally, is all rock. Then every pace of those steel shoes, along with the clatter of the hooves and the saddles creaking make considerable noise; yes.

Q. Can you plainly hear the conversation in back of you?

Mr. Lincoln: I object to that as being a conclusion of the witness, no proper foundation.

The Court: Sustained.

Q. (By Mr. Schell): How many times have you been down on that trail with parties yourself?

A. I wished I knew. I served the three [263] years from 1933 until '36 continuously as a trail guide, myself.

Q. Since that time have you gone down with parties from time to time? A. Yes.

Q. Based upon your experience in that work, will you tell us whether or not it is possible to hear conversations as the pack train is proceeding back of you?

(Testimony of John Davis Bradley.)

A. Might I explain this in this manner: As my routine as a guide, due to the fact that beyond the first person behind you, without very strict attention, even, to them, it is very hard to hear and understand, either them to understand you or you them while riding along. Therefore it was my custom to ask people, if they had any questions, if they would please ask them in the rest stops so that they would have a better chance to be understood and I would also have a better chance to answer their questions.

Q. Did you at my request—by the way, are pictures generally taken of the trip as it starts down into the Canyon?

A. There is a picture taken of all trips, the parties individually, that go into the Canyon on the Bright Angel Trail.

Q. Where are those pictures taken?

A. At Kolb Brothers' Studio, about 200 [264] yards, I would say, below the corral.

Q. And what else is done there at that place, if anything?

A. At the time the party is stopped for pictures to be taken, the guides are to instruct their parties as to the safety rules that we try to carry out.

Q. Are the cinches checked anywhere along the line?

A. About a quarter of a mile farther on down there is a particular stop made for that purpose.

Q. What is the reason for that?

A. Well, from the first saddling of these mules of a morning, I might say that the first thing they

learn is to throw pressure against those cinches so that they might not be too tight, I suppose. At any rate, they are cinched; that makes the fourth time before they are completely cinched up, that is, after they have traveled this short distance they relax to the point that they can be cinched where the saddle will not turn. [265]

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The Court: In view of the plaintiff's statement that he does not wish the case to be submitted on the question of negligence do you desire to offer proposed instructions on the question of warranty, Mr. Schell?

Mr. Schell: I do not remember what instructions I had.

The Court: The instructions that you have, as I recall them—I do not have them before me at this moment—deal with the case on the basis of the theory of negligence only.

Mr. Schell: I assume I would want to make some. I do not know what your Honor's final opinion on the matter is as to just what theory that it will be submitted on. But my warranty instructions that I would offer, of course, would be along the lines of my contentions in here that the warranty is one on the exercise of due care in the selection of the animal for that purpose.

The Court: If you desire to submit further proposed instructions, you may do so, and that applies to both sides, in view of our discussion today, and I will submit the case to the jury on the question of warranty.



Mr. Schell: Implied and express, both?

The Court: If the jury finds that there [266-1] is an express warranty, I will instruct them on the subject of both express and implied warranty, and, of course, if they find either or both to predicate a verdict on.

You Submitted, Mr. Lincoln, some special interrogatories.

Mr. Lincoln: Yes, sir; I did.

The Court: You have seen those?

Mr. Schell: Yes. I think we filed objection to the form that they were in.

The Court: I would suggest that if you wish to have special interrogatories submitted in view of the fact that the case is to be submitted as an action for breach of warranty, that you may propose special interrogatories and I will consider them if you so desire.

Mr. Schell: I am not quite as familiar with the Federal practice as with the State practice. But I take it, in view of the fact that the court has made the statement, if we do give instructions upon the fact of implied and express warranty, we do not thereby waive our contention that it is not applicable to the case at this time, I take it?

The Court: No. Well, you would not want the requested instructions, I take it, if you did not think it was the law applicable to the case. Of course, you would not waive your motion to dismiss or your objection to the state of the evidence.



Mr. Schell: No. In other words, at [266-2] times I have submitted an instruction along this line: That we do not believe, we will say, just for example, the doctrine of *res ipsa loquitur* applicable. However, in the event the court should instruct upon the doctrines of *res ipsa loquitur*, then we request the court so and so.

The Court: Oh, yes; you may make that reservation, certainly.

Mr. Schell: In other words, we did not want to be confronted that we have waived the point.

The Court: No. I thought you meant whether you would be bound by the requested instruction as embodying the law.

Mr. Schell: Oh, no.

The Court: Yes; you may submit any instructions you desire, so long as you are willing to concede yourself that those instructions embody the correct statement of the principles of law. You may reserve the contention that they are not applicable to this case.

Mr. Schell: Yes. That is what I mean, because we so frequently do that.

The Court: Yes.

Mr. Schell: Not so frequently, but occasionally do that, saying we do not believe a certain warranty is applicable, and *res ipsa* or something else.

The Court: But if it is, then it should be given as a correct statement of law. [266-3]

\* \* \* \* \*

Los Angeles, California, Thursday, October 2, 1947  
10:00 A.M.

The Court: Is it stipulated, gentlemen, that the jurors are all in their places?

Mr. Lincoln: Yes, sir.

Mr. Schell: So stipulated.

The Court: You may proceed.

Mr. Schell: I wonder if I could have the last question and answer?

JOHN DAVIS BRADLEY

Recalled.

Direct Examination

(Resumed)

By Mr. Schell:

(Record read by the reporter.)

Q. Mr. Bradley, in the place when the mule is in the string, when they start down is there any order because of the mule itself after they have once gotten into the dude string?

A. No order whatsoever.

Q. Insofar as the mule is concerned?

A. Yes; so far as the mule. Yes.

Q. Based upon the passenger that is on the mule? A. That is true.

Q. Do you know whether or not this mule Chiggers [268] had been in various places in the string, of your own knowledge?

A. I do; yes.

Q. And tell us what you had noticed about that, all prior to 1942.

(Testimony of John Davis Bradley.)

Mr. Lincoln: We would object to that as entirely immaterial.

The Court: Overruled. You may answer.

A. Well, of course, depending on the passenger he was carrying, as I said before. If he was mounted by a lady, he was put up somewhere in the order of first of the string; if mounted by a man, he was always on the latter end of the string. Now, that can be from the first man in the party on back to the last. And through a series of trips he would naturally be in all of those different positions, as very often—and always, rather, they left the corral just as the guides lead them out, in no particular order whatsoever, which naturally puts them sometimes at the end and sometimes in various places in the string.

Q. Did you check the photographer's or have checked down at the photographer's, at the Kolbs' there to see whether or not you could find any pictures which would show this particular mule on rides during the years of 1940-41? [269]

A. Yes, sir.

Q. Did you find some? A. I did; yes.

Mr. Schell: May I approach the witness with these?

Q. I hand you here a series of pictures. I notice on some of them there are merely slips of paper. Did you put those on there? A. I did.

Q. What do those slips of paper indicate?

A. That shows this particular mule Chiggers in these different parties and the order in which he is in the party.

(Testimony of John Davis Bradley.)

Q. In other words, you have written on the top one "3rd mule with the girl rider." Does that identify which is Chiggers?

A. That is true, starting from the guide's mule.

Q. The guide's mule would be No. 1?

A. That is true.

Q. And so on down the line, is that correct?

A. Yes, sir.

Q. And do these pictures accurately represent what they purport to represent here on the film?

Mr. Lincoln: I respectfully submit, your Honor, that would be a conclusion of the witness, unless the witness can testify that he was present each one of the times that [270] a particular photograph was taken, as I understand from the evidence he has already given.

The Court: Sustained.

Q. (By Mr. Schell): You recognize the scenes in the pictures, do you? A. Yes, sir.

Q. Are all of these pictures taken in the same general locality?

A. They are all taken in exactly the same place.

The Court: Do you recognize the mule?

The Witness: Yes, sir.

Mr. Schell: We offer these pictures into evidence, if the Court please.

Mr. Lincoln: We object to them as irrelevant, incompetent and immaterial, no proper foundation for it, and particularly desire to call your Honor's attention to the fact, which I believe to be a fact, that on each one of the pictures is a designation



(Testimony of John Davis Bradley.)

of a date. The majority of the dates there are in 1940 and '41. I think there is only one date, if my memory serves me, which is in 1942. And we will respectfully contend in that regard that photographs taken of this particular mule in 1940 and 1941 would not be material insofar as this issue is concerned.

The Court: Is there an objection that no foundation has been laid as to the dates? [271]

Mr. Lincoln: No, sir; there is not, because I would like to examine this gentleman upon that particular question before, perhaps, your Honor decides upon whether they should be introduced or not.

The Court: You may inquire.

Q. (By Mr. Lincoln): Mr. Bradley, I notice upon—I think it is the lower left-hand corner of each one of those pictures—is a date, some of the dates in 1940, some in 1941 and, I think, one in 1942. Can you tell me whether or not those are the dates on which those particular pictures were taken?

A. It is; yes.

Mr. Lincoln: Then I respectfully submit, your Honor, that my objection is good.

The Court: Objection overruled. How many photographs are there?

Mr. Schell: I am just counting them now. 14. There are some here without any slips on and I think the witness will have to identify Chiggers in these particular pictures. We had them out and there is no particular identification on which is the mule.

(Testimony of John Davis Bradley.)

The Court: You are offering the ones that have slips identifying them?

Mr. Schell: Yes. We are offering them, I think, all in a group, but I think we would have to have him identify [272] the pictures where there is no slip attached as to which mule it is. I think possibly the best way would be to draw an arrow on the picture to the mule.

The Court: Very well. You may withdraw your offer at this time until you complete your examination with respect to them.

Mr. Schell: Does the court have a pen?

The Court: Do you wish to hand it to the witness and have him identify the mule?

Mr. Schell: Yes. I just wanted to see whether this would work and make an imprint.

Q. Will you draw just an arrow to the particular mule which is Chiggers as represented in these pictures?

(Witness marking on photographs.)

Q. On this one it is not necessary. There is only one mule on it and that is Chiggers, is it, this one?

A. That is him; yes.

The Court: What would be the purpose of that photo?

Mr. Schell: Well, just to give a picture of the mule. In the others he is all in a group and sometimes you only see a little part of him, and it would take somebody that knows the mule to recognize him.

(Testimony of John Davis Bradley.)

The Court: Do you wish them all marked as one exhibit?

Mr. Schell: Yes, if the court please.

The Court: They will be received into evidence. Are [273] they arranged all in order?

Mr. Schell: By way of dates?

The Court: Yes.

Mr. Schell: I can. However——

The Court: I do not think it is necessary unless you desire to.

Mr. Schell: No; I don't think it is necessary.

The Court: You may hand them to the clerk. They will be received into evidence and marked Defendant's Exhibit——

The Clerk: I, your Honor.

The Court: I. They will be marked I-1, -2, consecutively. How many are there all told?

Mr. Schell: I beg your pardon?

The Court: How many are there?

Mr. Schell: I think it was 14.

The Clerk: I count 14.

The Court: Then they will be marked I-1 to -14, inclusive.

Q. (By Mr. Schell): Do you know Mr. Mateas?

A. Yes, sir.

Q. By the way, did you mount Mr. Mateas on the morning of June the 17th? A. Yes, sir.

Q. On what mule did you mount him?

A. I mounted him on Chiggers. [274]

Q. Did you give any instructions to him how to hold the reins or anything of that character?

A. Yes, sir.

(Testimony of John Davis Bradley.)

Q. State whether or not that is standard practice?      A. That is standard practice.

Q. And why?

A. Well, the people will be sure and understand this, as each guide is instructed to give the individual those instructions, as well as in a group after the guide has them in his charge.

Q. I mean what is the purpose of having them hold the reins?

A. Well, that is so that they might have some control, at least, over the animal should they need it. For instance, if a little rock or a lizard or something should roll down under one unexpectedly, why, he might give a little jump, you know, and, at the same time, he might stumble, which, if you have ahold of the reins, it has a tendency to help the animal up, to help him regain his feet; and, at the same time, to keep them from stopping along the trail and grabbing at the bushes or grass, which would have a tendency to allow them to look behind, which is our biggest safety rule, is to keep these groups in close order.

Q. Did you go down to the place where Mr. Mateas [275] was, later?      A. I did; yes.

Q. And did you help bring him up to the hospital?      A. Yes, sir.

Q. Are you familiar with the place where the accident occurred?      A. I am.

Q. Where you found Mr. Mateas?

A. Yes, sir.

Q. Did you personally take any photographs of that location.      A. Yes, sir.



(Testimony of John Davis Bradley.)

Q. I show you here three photographs and ask you if these are photographs you took?

A. Those are the pictures I taken; yes.

Q. The first picture I show you here, which is marked on the back No. G——

The Court: Exhibit G for identification.

Q. (By Mr. Schell): ——Exhibit G for identification, and ask you what that depicts?

A. Why, that shows the trail in general at this particular spot. Of course, the spot is not marked on the picture identically where Mr. Mateas hit the ground, but it shows that place clearly.

Q. And which way is that looking, towards the river [276] or uphill, this G?

A. From the back of the picture is looking up the hill, to the back of the picture. In other words, the lower part of the picture is towards the river.

The Court: Your camera was pointed uphill, was it?

The Witness: Yes.

Q. (By Mr. Schell): I show you Exhibit F and ask you which that is?

A. That is the same location from a slightly different angle but taken in the same direction.

Q. Taken in the opposite direction?

A. I beg your pardon. It is taken from the opposite direction. Yes; the camera is looking down the hill in this picture and up the hill in the second one.

Q. What is the third picture which is marked E or F? I can't tell whether that is F or E—E, I think.

(Testimony of John Davis Bradley.)

A. That is just a close-up picture of the ground in the immediate area that Mr. Mateas struck it.

Mr. Schell: We offer these as the defendant's next exhibits.

Mr. Lincoln: We object to them as immaterial.

The Court: Overruled. Defendant's Exhibits E, F, and G for identification are received into evidence.

The Clerk: So marked.

Q. (By Mr. Schell): About how far is this place where [277] these last pictures were taken from Indian Gardens?

A. About three miles below Indian Gardens.

Q. Towards the river from Indian Gardens?

A. Yes, sir.

Mr. Schell: We would like to exhibit these to the jury at this time, if the court please.

The Court: You may pass them to the jury.

Mr. Lincoln: All the photographs?

The Court: That is Exhibits E, F, G and I?

Mr. Schell: That is right. That is all.

### Cross-Examination

By Mr. Lincoln:

Q. Mr. Bradley, if I understand you correctly, speaking about this mule Chiggers, he was a very affectionate sort of an animal, was he?

A. He was; yes.

Q. And how does he show that affectionate portion of his nature?

(Testimony of John Davis Bradley.)

A. Well, just in the manner of being entirely gentle, to the effect that you can walk up to him in the corral or any place that he might be standing without being tied and he is not easily excited.

Q. Is that the only way in which he showed that affectionate portion of his disposition? [278]

A. Well, that is about the only way they have to show such disposition.

Q. Mules differ in disposition the same as people, don't they, Mr. Bradley?      A. Yes, sir.

Q. Take, for example, the 25 mules of which Chiggers was a portion, when they came there from Missouri and you first examined them you found different dispositions among the 25, did you?

A. Individually, yes.

Q. Do those different dispositions have any different trainings or do they all have the same general training which you have already described?

A. They have the same training, with the exceptions, of course, the gentler disposition takes less training.

The Court: By that you mean it takes less time to train them?

The Witness: Yes, sir.

Q. (By Mr. Lincoln): How wide a mule was this mule? By that I mean how wide across the back or across the rump, whichever way you make your measurements?

A. Well, I am sorry. I am afraid you have got me there. I never measured one across the back. He was——

(Testimony of John Davis Bradley.)

Q. Would you say he was two or three feet?

A. Oh, I would say two feet. [279]

Q. Two feet?

A. That is just a guess, of course.

Q. Yes. And how much did he weigh?

A. I would say around 950.

Q. How does that compare with other weights of the other animals in the string? Was it, as a general thing, lighter or heavier than the other mules?

A. An average.

Q. They run about the same size, do they?

A. Slightly below the average. That average is about a thousand pounds.

Q. You select that particular size of mule, I suppose, for this particular work, don't you?

A. That is the chosen size; yes.

Q. I think you said Bob Ennis, the boy, first went on the payroll in 1941; that is the Harvey Company payroll you are referring to?

A. Yes, sir.

Q. And what part of 1941 was that, that is, what month in 1941?

A. I am sorry I couldn't be accurate, but it would be immediately after his schooling was out, I believe, as he was going to school at that time and guided only through summer vacation.

Q. That would be probably June or July? [280]

A. Yes, sir; possibly June.

Q. Then he went back to school, did he, in that fall, that same year?

A. I believe he did, yes.



(Testimony of John Davis Bradley.)

Mr. Lincoln: I think that is all, Mr. Bradley, thank you.

The Court: You may step down, Mr. Bradley.

Juror Dorr: Your Honor, may I ask the witness a question?

The Court: Yes; you may, Mr. Dorr.

Juror Dorr: Mr. Bradley, was there an inflexible rule that guests could not change mounts on these expeditions?

The Witness: No, sir. That is purely up to the guide's judgment after he leaves the corral, as we do that quite often. At times we find that one person particularly is riding a mule, that that mule appears to be lazy and this person is scared and won't keep him up, and we have someone else in the party that is shown to be a better rider, and the mules differ in that, too. Some of them travel well of their own and others take advantage of their riders, more so. In those cases quite often we change riders after they leave the corral, along the trail, so they are better mounted and the party is easier to handle all the way through.

Juror Dorr: According to the judgment of the guide, [281] Mr. Bradley?

The Witness: Yes, sir.

Another Juror: Your Honor, may I ask?

The Court: You may.

The Juror: After this man went over the head of the mule what did the mule do at that time, at that particular instant?

(Testimony of John Davis Bradley.)

The Witness: Well, of course, I was not there, but I was told that he just walked a few feet and went to eating grass along the edge of the trail.

The Court: You are Mr. Tassell?

The Juror: Tassell.

The Court: Tassell. Any other questions?

Juror Pauly: Yes, your Honor.

The Court: Mr. Pauly.

Juror Pauly: There has been a lot of talking about the handling of the reins. It is my understanding it is always the standard practice at any time you ride a horse or mule to hold your reins up?

The Witness: Yes, sir.

Juror Pauly: And they are apt to drop their heads and be less alert, aren't they?

The Witness: That is right; and, at the same time, they can—those reins, if they stop to eat, those reins can slide down and get plumb off behind their ears and they [282] are likely to step a foot through them; and there are several different reasons.

Juror Pauly: That is what I mean; that is not just your rule, that is standard.

The Witness: Yes; that is a standard rule.

The Court: Mr. David?

Juror David: May I ask was this Chiggers' first trip on this particular trail down in 1942?

The Witness: That is his and all the mules in that particular party; yes.

Juror David: The first trip.

(Testimony of John Davis Bradley.)

The Court: Any further questions? You may step down, Mr. Bradley.

Mr. Lincoln: Just one question, if I may, your Honor.

The Court: Yes; you may.

Mr. Lincoln: One which was suggested by the remark of one of the jurors.

Q. Speaking about holding the reins, Mr. Bradley, does that mean to hold the reins up tight or does it simply mean that you hold the reins so they won't fall down?

A. That means to hold the reins so as not to pull on the animal's mouth but so that you have it there immediately in case you should have any occasion to pull him up for any reason. You have the reins in your hand, [283] not to hold them in any particular manner. As we tell the riders usually, if asked about them, to hold them in whatever manner is natural to them, just to hold onto the reins at all times.

Q. That means to simply hold the reins at all times and not hold them tight?

A. That is true.

The Court: By that do you mean it would be all right, under your instructions, for a rider to ride along holding the reins with his hand and have his hand leaning against the pommel of the saddle or horn of the saddle?

(Testimony of John Davis Bradley.)

The Witness: Any way that is more comfortable and natural to him, just so long as he holds onto the reins.

The Court: Just so they are in his hands?

The Witness: That is true.

The Court: Any further questions?

Mr. Schell: Yes, I might ask one question I think I overlooked, which was also suggested by a question.

Redirect Examination

By Mr. Schell:

Q. Mr. Bradley, in your experience with mules did you ever have any trouble when you first started the mules out after they had been in pasture during the winter?

Mr. Lincoln: Objected to as immaterial. [284]

The Court: Overruled.

Mr. Lincoln: No proper foundation, calling for matters which are not pertinent to this issue at all, not confined to this situation.

The Court: Overruled.

Mr. Schell: Do you have the question in mind?

A. I would like to a little better understand it, I believe, Mr. Schell. May I have it gain, please?

Q. Have you had experience previously with mules that had been off on pasture? I mean the mules that have been used before as dude mules and then you put them out to pasture, and then you put them back on service again; have you had that experience? A. Always.



(Testimony of John Davis Bradley.)

Q. And state whether or not you have had any difficulty with mules on their first trip?

A. We never have, sir.

Q. Were all these mules on this particular excursion mules that had been out to pasture for the winter?

A. Yes, sir.

Q. By the way, do you know the particular mule—I will show you a photograph here, and see if you recognize—may I have the plaintiff's exhibit, the photograph of the party?

The Court: Exhibit 4, I believe. Is it Exhibit 4?

Mr. Schell: Yes, sir.

Q. Do you recognize the mule that the guide was on?

A. Yes, sir; riding Bird.

Q. That is right; that is 4. Is that, or was that at that time, either, also known as a dude mule?

A. Yes, sir.

Q. And he carried dudes up and down prior to that particular trip?

A. Yes, sir.

Q. I mean in the previous years?

A. Yes.

Mr. Schell: That is all.

The Court: You may step down, Mr. Bradley.

Mr. Schell: Mr. Yarberry, will you come forward, please?

C. YARBERRY

called as a witness by defendant, being first sworn,  
was examined and testified as follows:

The Clerk: What is your name, sir?

The Witness: Colonel Yarberry, C. Yarberry,  
Y-a-r-b-e-r-r-y. [286]

Direct Examination

By Mr. Schell:

Q. Mr. Yarberry, where do you live?

A. Grand Canyon, Arizona.

Q. By whom are you employed?

A. Fred Harvey.

Q. How long have you been working for him?

A. 26 years the 25th of next month.

Q. What type of work do you do?

A. Well, I broke mules to pack, guide, feed  
mules in the barn and everything.

Q. How many years' experience have you had  
handling mules?

A. Ever since I was 10 years old.

Q. How old are you now?

A. I am 71 years old. I ran off from home when  
I was 10 years old and I was making my own  
living.

Q. In 1938 what were you doing for Fred  
Harvey?

A. I was running the pack train.

Q. By running a pack train what do you mean  
by that? Describe what a pack train is.

(Testimony of C. Yarberry.)

A. Well, a pack train is packing lumber, coal, grain, hay, gasoline, fuel oil, laundry down to the Phantom Ranch in the bottom of Grand Canyon.

Q. And what do you use to pack it down with?

A. Mules.

Q. Did you know a mule by the name of Chiggers?

A. Yes, sir; I shore do.

Q. By the way, do you know who selected that name?

A. Yes, sir, I did.

Q. How did you happen to call him that?

A. I had a little pet horse down in Texas. He was so quiet and nice and gentle that I always wanted to name a mule Chiggers, and I never did get the chance to pick out the right kind of a mule to name Chiggers until this little old mule come along. So, when I walked in the corral and stood there and looked at him a while, and walked up to him and put my hand on his neck, I said, "I will call you 'Chiggers'."

Q. And that was that?

A. And that was that. That is the way the name—how I got the name.

Q. Did you use Chiggers in 1938 in the pack string?

A. Yes, sir.

Q. Tell us a little bit how you used him, what you did with him to break him?

A. Well, we broke him to lead, put a pack saddle on him and run him up and down the trail there so his muscles got solid or stout, you know, and his wind got good. You could catch him anywhere on the trail you wanted to. So there was four of us

(Testimony of C. Yarberry.)

packing. Each one of us had [288] a canteen, and I snapped my canteen on, mine on one side and the other boy would snap his canteen on the other side. The regular rings of a pack saddle are about this far apart——

Q. About six or seven inches apart and about three or four in diameter?

A. That's right. Whenever we wanted a drink, all we had to do was just to stop the mules and go back. Chiggers would just stand there, we unsnap the canteen and take a drink.

Q. Then after he got hardened did he carry loads?

A. Yes, sir. He carried hay, he carried grain, he carried chuck.

Q. What is chuck, food?           A. Yes, sir.

Q. What do you do to see whether or not they shy or are gentle, and so forth?

A. Well, tie tarps on them and ride them with slickers. Maybe you will be trotting down along the trail, you know, when you put him first on the trail and first start packing him. They are drove, you see, until they get used to, you know, carrying a load downhill, otherwise they will get like a hyrdophobia dog; they will get sick traveling by himself, you know, see. Often he has got his head down and walking along, and sometimes the pack turns under his [289] belly before you get to him. You can't cinch a young mule up tight. If you do cinch him up too tight, he will get tender and sore under the cinch and then when you go to cinch him up again,



(Testimony of C. Yarberry.)

you can't cinch him tighter. After you cinch him up first, the saddle is loose—this is a pack saddle I am talking about, see—and gradually you keep cinching him tighter and tighter and tighter, and the first thing you know, why, you are tough all under here, you know, you see, and in the tenderness here. And sometimes the pack turns and they get a load under his belly. Maybe he will kick and bite, or up and just stop, you see, and you have to get off and take the load out from under his belly and cinch him tighter.

Q. How did Chiggers behave in connection with his training? Was he hard to train or otherwise?

A. Well, Chiggers, about the first day I seen him is just like he is today, just the same Chiggers, just as gentle. He didn't care for nothing, you know. He was like a Supai Indian. Time means nothing to Chiggers.

Q. Then how long did you use him in your string?

A. Well, I packed him all that fall and then he was shipped off to pasture, and then he come back in the spring and we packed him all that spring and rode him, and then a guide taken him and we went to riding him in the dudes' string. [290]

Q. Did you ride him during the time you had him in your pack train?

A. Yes, sir; both fall and spring, too, and summer. Yes, sir.

Q. Now, in 1940 and '41 did you do any guiding?

A. Yes. I was a guide, I think, in '41. I don't know just how much, but I think I was.

(Testimony of C. Yarberry.)

Q. In other words, sometimes you would guide when there were shortages? A. Yes, sir.

Q. Or a good many parties, is that right?

A. Yes, sir.

Q. Did you ever have Chiggers in your string during that time?

A. Yes, sir; I had him a number of times. I wouldn't know how many times, but I have had him in the string.

Q. Did you ever have any trouble with him during that time?

A. No; I never did. No, sir.

Mr. Schell: That is all.

Mr. Lincoln: No questions.

The Court: You may step down, Mr. Yarberry.

The Witness: Thank you.

Mr. Schell: Bob Ennis. [291]

### ROBERT E. ENNIS

called as a witness by defendant, being first sworn, was examined and testified as follows:

The Clerk: Please state your name.

The Witness: Robert E. Ennis.

#### Direct Examination

By Mr. Schell:

Q. Will you please keep your voice up?

A. Yes, sir.

Q. Where do you live at the present time?

A. At the present time I am stationed at Langley Field, Virginia.

(Testimony of Robert E. Ennis.)

Q. And what is your occupation now?

A. I am in the United States Air Force, pilot.

Q. How old are you now? A. I am 23.

Q. During your early life where did you live?

A. I lived at Grand Canyon, Arizona.

Q. Where your parents there?

A. They were.

Q. Have you had experience in going up and down the various trails leading from the rims of the Canyon down to the bottom?

A. Yes, sir. Just about as long or as far back as [292] I can remember I have been riding down into the Grand Canyon.

Q. Did you from time to time work as a guide?

A. Yes, sir; during my summer vacations from school.

Q. When did you first start taking parties down?

A. You mean on the payroll? I started on the payroll in 1941.

Q. Before you went on the payroll had you been down with parties? A. Yes, sir.

Q. In 1941 where did you work mostly?

A. Most of the summer I was on the north rim.

Q. And where the El Tovar is, that is on the south rim, is it? A. Yes, sir.

Q. Had you ever known a mule known as Chiggers before June 17, 1942? A. Yes, sir.

Q. Had you ever personally used him as a mule in a string before that?

A. No, sir; I don't believe I ever did before that time.

(Testimony of Robert E. Ennis.)

Q. Had you seen him being used?

A. Yes, sir.

Q. Before 1942? [293] A. Yes, sir.

Q. And where had you seen him?

A. Well, sir, our north rim trip, the two-day trip, meets at Phantom Ranch the same as the two-day trip from the south rim; and I have seen him down there a number of times, and also when I went to the south rim I have seen him quite a few times.

Q. On the particular day in question, June 17th, did you start down with a party? A. Yes, sir.

Q. Do you remember Mr. Mateas being in that party? A. Yes, sir.

Q. Do you know what mule you were riding?

A. I was riding Bird.

Q. Was that a mule that had been in the pack string before, or the dude string, I mean?

A. Yes, sir.

Q. About what time, if you remember, did you start from the top?

A. It was about 11:00 o'clock.

Q. And your destination was Phantom Ranch that night? A. Yes, sir.

Q. Now, going down the trail after you started from the corral where was your first stop?

A. The first stop was the Kolb Studio, approximately [294] 200 yards down the trail, where the picture was taken.

Q. Did you give any instructions to your party?

A. Yes, sir.

Q. What were those instructions?



(Testimony of Robert E. Ennis.)

A. Well, sir, as soon as the picture was taken I ride around the switch-back where all in the party can see me and I can see all of them, and I tell them my name, and I would try to make it a pleasant trip for them. There was four things that I always asked my people to do, was to always hold the reins, to always keep their feet in the stirrups, try to keep their mules as close to each other as they could, and to not get on or off of their mules unless I was there to help them.

Q. Did you give such instructions to this particular party?      A. Yes, sir.

Q. What was your next stop?

A. Approximately a half a mile down the trail we stopped to cinch up the mules and make a final check of all the cinches and see that the saddles were setting right.

Q. Did you do that on this date?

A. Yes, sir.

Q. Up to that time had you had any complaint by Mr. Mateas or anybody about the actions of Chiggers? [295]      A. No, sir.

Q. Going down that trail are there switch-backs or is it all a straight trail?

A. There are switch-backs. There is quite a number of switch-backs.

Q. What, if anything, did you do on this day to check your party as you went down?

A. Well, I would say a good half of the time I am riding, turning back towards where I can see the party, and when I am not doing that, I am on

(Testimony of Robert E. Ennis.)

the switch-back to where they are always right in front of me as they are coming down. I can always see them.

Q. During the way down did you see the party as a whole?      A. Yes, sir.

Q. Did you observe Chiggers along with the other mules?      A. Yes, sir.

Q. Did you notice anything unusual about his conduct?      A. No, sir.

Q. Where was your next stop?

A. We stopped at Indian Gardens, four and one-half miles down, where we ate.

Q. From the time you left the corral until you got to Indian Gardens did you hear anybody making any complaint [296] about the manners of Chiggers?

A. No, sir.

Q. Did you see anything unusual about his actions?      A. No, sir; I didn't.

Q. Then what did you do at Indian Gardens?

A. We stayed there approximately an hour, ate our lunch.

Q. Where do you eat lunch there? Where did you at that time?

A. Right beside the trail just as you come into the Gardens there is tables there, where we ate our lunch right by a water fountain.

Q. Were the whole party seated there?

A. Yes; it was.

Q. Did you hear any conversation at that time with reference to Chiggers?

(Testimony of Robert E. Ennis.)

A. Well, sir, we had quite a bit of conversation about the mules at the Canyon. I can't remember just what was said about any one particular thing.

Q. Was any complaint made to you or request to change mules? A. No, sir——

Mr. Lincoln: Objected to as being a conclusion of the witness.

The Court: Sustained, unless restricted. [297]

Q. (By Mr. Schell): Do you remember anything being said to you with reference to a request for a change of mules by any member of the party?

Mr. Lincoln: Objected to as already having been answered in a different form.

The Court: Overruled, overruled.

The Witness: Do I answer?

The Court: You may answer.

The Witness: Would you read that, please?

The Court: Please read it, Mr. Reporter.

(Question read by the reporter.)

A. No, sir.

Q. (By Mr. Schell): Was this mule that you were riding a gentle mule?

A. Yes, sir.

Q. Assuming a complaint had been made to you or called to your attention that someone was having trouble with the mules what would your practice be?

Mr. Lincoln: Objected to as argumentative, incompetent and immaterial.

The Court: Sustained.

Q. (By Mr. Schell): Were you informed by anyone at the time at Indian Gardens or anywhere



(Testimony of Robert E. Ennis.)

in that general vicinity, up to that time that there had been any trouble with the mule Chiggers? [298]

A. No, sir.

Mr. Lincoln: Objected to as already answered in another form.

The Court: Overruled. The answer may stand.

Q. (By Mr. Schell): What did you do at Indian Gardens?

A. After we ate lunch I went and cinched up all the mules and checked the saddles, untied the mules, then loaded the people on, and from there we went around approximately 30 feet to the water trough where we watered our mules.

Q. Do you remember wherether or not the people were mounted on different mules?

A. No, sir; I do not.

Q. Does that sometimes happen?

A. Yes, sir. I would say that approximately once, and usually twice, in a day when we take a party down we have to change somebody back from a mule when they will accidentally get on a wrong one. That is just an ordinary occurrence.

Q. Such a thing may have occurred and you do not remember it, is that right?

A. Yes, sir. That is one of the reasons I ask my people to remain off their mules until I get there to help them on. Besides wasting the time, they always have the chance of getting on the wrong mule and it will step out [299] from underneath them.



(Testimony of Robert E. Ennis.)

Mr. Lincoln: I ask the testimony beginning "That is one of the reasons" be stricken out as not responsive to the question, a voluntary statement of the witness.

The Court: The motion will be granted.

Mr. Lincoln: And the jury be instructed to disregard it.

The Court: The jury are instructed to disregard it.

Q. (By Mr. Schell): After you left the watering trough where did you go?

A. Headed down the trail towards the river.

Q. As you were going down were there some more switch-backs in there? A. Yes, sir.

Q. What, if anything, did you observe about the mules, and particularly Chiggers, from that time on? A. I observed nothing out of the way.

Q. State whether or not mules sometimes have a tendency to crowd up pretty close to one another.

Mr. Lincoln: Objected to as argumentative.

The Court: Overruled.

A. Well, sir, we like to have our mules stay just as close as they can; and there are some mules that are good travelers, that will put their heads right up behind other mules' rear ends and sometimes just kind of walk [300] right along with them. Sometimes they will do it for a switch-back or two, and sometimes they will do it longer.

Q. (By Mr. Schell): Did you see Mr. Mateas fall off the mule or get off the mule in some way or other on the way down to the river?

A. Yes, sir; I did.

(Testimony of Robert E. Ennis.)

Q. What did you see in that respect?

A. The first I noticed, Mr. Mateas was in the air kind of as if he was making a dive, going right over the mule's head.

Q. What did you observe about the mule?

A. I couldn't see the mule.

Q. What did you do when you saw that?

A. As soon as I saw it, I jumped off my mule and ran back to Mr. Mateas.

Q. About how far was that place where that occurred?

A. That is approximately a half a mile from the river.

Q. About how far is it from Indian Gardens to the river?

A. It is three and one-half miles.

Q. And this was about three miles from Indian Gardens?

A. Yes, sir.

Q. At that point is that trail steep or is it comparatively level?[301]

A. It is comparatively level. You are following the contours of the creek.

Q. After you went back to Mr. Mateas where did you find him?

A. He was lying just at the side of the trail in a catclaw bush.

Q. What is a catclaw bush?

A. Well, it is a bush that has claws, kind of like a cat. I am not sure of the real name of it, but that is what it is known as there; kind of like a rosebush except it does not have the pretty flowers.

(Testimony of Robert E. Ennis.)

Q. And what did you do for Mr. Mateas at that time?

A. Well, I asked him what was the trouble, and he wouldn't talk to me or couldn't talk. I Asked him if he could move and he said he couldn't and wouldn't. And by that time there was another gentleman came back to help me out.

Q. What did you do for him?

A. Well, Mrs. Mateas wanted to come back, so I went up and helped her off her mule and, while I was there, I got my first-aid kit and brought it back through the mules so she wouldn't get kicked. At that time I untied two slickers out of the saddle and made a pillow out of one of them and covered this bush up with the other one so he would be in the shade. [302]

Q. Then what did you do?

A. Well, we tried to get more questions out of him: Where he hurt, what seemed to be the trouble, and he still could not move and wouldn't. And he was in pain, all right. The way he would talk, you could tell he was hurting.

It was decided then that, since we were out in the sun and it was quite hot, that I should take the rest of the party down the river, approximately half a mile down the trail. So I helped—I already had them on. We never did take the ladies off. I took the three remaining ladies, two or how many there was, down to the river.

Q. And then did you come back?

A. Yes; I did.



(Testimony of Robert E. Ennis.)

Q. During the time you were down in the Canyon did you ride Chiggers? A. Yes, sir.

Q. And where did you ride him to?

A. Sir, when I took the ladies down to the river, I called up John Bradley and told him I had had an accident; and while I was there I also talked to the doctor and told him what seemed to be the trouble. He told me to go back up and see if Mr. Mateas could have any feeling in his legs or anything. So I went back up and found out that he couldn't. So I got on Chiggers and rode back down to the river where the telephone was. [303]

Q. Then you rode back to Mr. Mateas later?

A. Yes, sir.

Q. After you had made your phone call?

A. After I had made the phone call.

Q. Then did you go back and stay with Mr. Mateas from then on?

A. No, sir. After I made the second phone call I went back to Mr. Mateas and told him that John Bradley and the doctor was on the way down and would be there as soon as possible. I had made arrangements to be met on the river trail which connected the Bright Angel Trail with the Kaibab Trail. So I went back down to the river and took the three ladies over to where I was met on the river trail, and they went on to the Phantom Ranch and I came back where Mr. Mateas was.

Mr. Schell: You may examine.

Mr. Lincoln: No questions. [304]

\* \* \* \* \*



The Court: Does either side have any further requested instructions to submit?

Mr. Lincoln: I have nothing further.

Mr. Schell: I dictated some this morning, they are not in court but I will have some when I come back. I find it somewhat difficult to put my thoughts on paper. It was not quite as simple as I anticipated. I really did not anticipate it was simple, but I mean it was just as difficult as I anticipated. I have dictated them. I worked last night trying to outline them and this morning I dictated them and, of course, they probably have been done by now.

May I ask that all these witnesses be excused now so they may go?

Mr. Lincoln: As far as I am concerned, certainly.

The Court: All witnesses in this case are excused from further attendance.

We will meet at 1:30, then, gentlemen, and discuss the proposed instructions. Will you send me up a copy of your proposed instructions prior to 1:30?

Mr. Schell: Where shall they be taken?

The Court: To my secretary's office.

Mr. Schell: Yes; I will be glad to. I will check them over and if they are correct, I will send them right up; [317-1] and if they have to be changed, I will change them and send them up as quickly as I can.

The Court: If they would not arrive a half hour in advance of 1:30, there would not be any-

thing gained by that inconvenience; so you might as well bring them up with you.

Mr. Schell: I will endeavor to send them right up.

The Court: And, of course, serve counsel.

Mr. Schell: Yes.

Mr. Lincoln: Of course, your Honor may realize the predicament I may be in. I may want to ask your Honor for some additional ones to counteract or counterpart those which Mr. Schell presents.

Mr. Schell: I am in the same predicament.

The Court: I suppose we had better get the proposed instructions before attempting to discuss them. Do you wish the matter and does the plaintiff wish the case submitted to the jury on the question of both express and implied warranty?

Mr. Lincoln: It seems to me, your Honor, that that is the law of the case as settled, the law of this particular case.

The Court: As to both express and implied warranty. I am convinced that the law of California which covers here is to the effect that the implied warranty, the warranty implied by law from the mere contract of hiring, is that the [317-2] party hiring the animal has to use reasonable care to see that the animal is reasonably fit for the purpose for which it is hired. So I take it that both of you are agreed that this was a hiring of the mule?

Mr. Lincoln: I think that is true.

The Court: It is not the usual livery stable hiring of animals because of the control which the defendant had over the animal. My question is:

Does the plaintiff wish the case submitted on implied warranty alone or does the plaintiff contend that there was an express warranty made which was breached?

Mr. Lincoln: We cannot, your Honor, successfully contend that there was an express warranty as to this particular mule.

As to whether or not the phraseology in the advertisement, in the circular, that portion of the circular which your Honor read yesterday, creates an express warranty, I am free to confess I am somewhat in doubt myself. I think, without any question, it did create an implied warranty which we were entitled to rely upon.

The Court: The law raises the implied warranty, if nothing had been said.

Mr. Lincoln: Yes.

The Court: As I understand the law, if Mr. Mateas had gone up and said, "I want to go on that trip. Give me [317-3] two tickets." Had not seen a circular or anything else, just heard there was such a trip and that is all he knew about it, laid down his money, took the tickets and went out to the corral and got on the mule, the law would still raise the implied warranty, according to my understanding.

Mr. Lincoln: I think so.

The Court: Do you gentlemen agree?

Mr. Schell: I think so. That would be implied warranty that your Honor just outlined. [317-4]

\* \* \* \* \*



Los Angeles, California,  
Thursday, October 2, 1947, 1:30 P.M.

The Court: Is it stipulated, gentlemen, that the jury are absent?

Mr. Lincoln: Yes, sir.

Mr. Schell: So stipulated.

The Court: Have you seen the additional jury instructions requested by the defendant?

Mr. Lincoln: I received them, your Honor, just about 1:00 o'clock today; yes, sir. And I have prepared some objections which should be here most any moment, sir. My stenographer is working on them now, together with one or two additional instructions which I would respectfully ask your Honor to give in place of those which I am objecting to. These additional instructions are based upon the question of warranty which your Honor and I discussed previously today.

The Court: Do you gentlemen view this transaction a hiring of personal property?

Mr. Schell: Well, I would say that it was hiring or renting.

The Court: Well, that is the same thing, "hiring or renting."

Mr. Schell: Yes, or renting.

The Court: I suppose, popularly, today they call it [318] "leasing," do they not? Leasing has came to be used in applying to personal property as well as real property.

Is that the way you look at it, too?

Mr. Lincoln: It seems to me so; yes, sir. [318-1]

\* \* \* \* \*



The Court: Is it stipulated, gentlemen, that the jury is absent?

Mr. Lincoln: Yes, sir.

Mr. Schell: So stipulated.

The Court: After reading that opinion several times, I do not believe that the Circuit Court intended to do any more than to hold that a case was made out to go to the jury on a theory of either negligence or breach of warranty or both.

I have tried my hand at formulating some instructions which not only meet the language of the California cases, [318-3] as I understand them, but also, I hope, the intelligence of the jury.

With all deference, I can say it seemed to me that if I made up a set of instructions which merely took the language of the California decisions, the jury would not know what I was talking about.

My secretary is about to finish them, and if you gentlemen could wait for probably 20 to 30 minutes, you could take a complete set home with you.

Mr. Lincoln: Thank you, sir.

The Court: You will have copies of each of them, and then let us all study them and meet tomorrow at 9:30 and deal with the objections and suggestions that you may have.

I will ask you to do this: In making your objections, of course, make any you wish for the record, but as far as making them for the purpose of this discussion, offer a constructive suggestion. In other words, if one word is wrong, let us have the definite suggestion as to what you think the word should be or how the instruction should be worded.

I want to present this issue, of course, fairly and squarely so the jury can decide according to the facts they find and the law.

Mr. Lincoln: Those last three proposed instructions which I have written in longhand I shall be able to present [318-4] to your Honor in type-writing tomorrow morning.

The Court: You won't need to do that.

Mr. Lincoln: I will be very glad to do it. It might be easier for your Honor to read. My handwriting is not as intelligible sometimes as the type-writing is.

The Court: I will be glad to read them.

Mr. Lincoln: Thank you.

The Court: Do you feel that special interrogatories should be submitted to the jury in this matter?

You do not need to answer that now. I would like to hear from both of you on it tomorrow morning. And if you do think it should be submitted on special interrogatories, you probably would wish to revise your requested interrogatories in the light of our discussion.

Mr. Lincoln: Yes, sir.

Mr. Schell: I might say this: That I do not know whether it should be part of the procedure to present special interrogatories, but at least I think possibly after I see the court's instructions, it might give me an idea of what to submit as special interrogatories.

The Court: Do you think they should be submitted in this case?

Mr. Schell: I do not know that it is essential, of course, but it might be of assistance to get them to see what the factual issues are. Then they have as much [318-5] difficulty applying the law even after the instructions as we have had.

The Court: Very well. [318-6]

\* \* \* \* \*

Los Angeles, California,  
Friday, October 3, 1947, 9:30 A.M.

The Court: Is it stipulated, gentlemen, that the jury are absent?

Mr. Lincoln: Yes, sir.

Mr. Schell: So stipulated.

The Court: I want to say at the outlet, Mr. Lincoln, that after reflection over night on this question of express warranty, I have come to the conclusion that express warranty here does not contain any greater content than the implied warranty; and I take it that is the doubt you had yesterday when you said you had trouble spelling anything out of that circular.

Mr. Lincoln: That is why I was waiting for your Honor's wiser suggestion.

(Further legal discussion omitted from transcript.)

The Court: That will, of course, necessitate the elimination entirely, as well as the modification, of some of the early instructions. It will eliminate entirely what are now numbered proposed instructions 21 and 22. When I refer to proposed instructions, now, I will say "court's instructions," instead



of "proposed instructions" to distinguish them from any instructions proposed by the parties. Eliminate 21 and 22.

Mr. Lincoln: While you are on that subject, may I also suggest, your Honor, that on No. 11——

The Court: We will take them up now *seriatim*.

Mr. Lincoln: Oh, pardon me.

The Court: Are there any suggestions or objections [320-1] with respect to the first nine of the court's suggested instructions?

Of course, that includes not only the possibility of correcting those suggested by the court but also eliminating any that counsel deems non-essential.

Mr. Lincoln: Yes, sir.

Mr. Schell: I think I see nothing in the first nine.

The Court: Do you see anything in the first nine?

Mr. Lincoln: No, sir. In fact, I had no criticism of all of them. They were so much better than I had written or could write that I was anxious to accept them in their entirety.

The Court: Coming to the court's numbered 10, I had noticed a suggested change, in the interests of clarity, and then also changed "warranties" to "warranty" in view of the elimination of the express warranty feature. So that instruction 10, as so amended, would read now:

"The plaintiff in this case claims damages for personal injuries alleged to have been suffered by him as a proximate result of claimed breach of the implied warranty"——



strike the "of" and insert "made by" "the defendant in connection with the hiring or letting \* \* \*."

As so amended is that instruction satisfactory to both sides? [320-2]

Mr. Lincoln: To us.

The Court: I do not wish to foreclose either counsel. This question of law has been of so much difficulty, apparently, to counsel and to the court in this case that I want to say in connection with this discussion, that even though you approve tentatively the instructions, after you have heard them given, if you feel that any of them are erroneous, I am going to excuse the jury prior to the last instruction and give you an opportunity to make a record of your objections.

Does 10, as so amended, seem satisfactory?

Mr. Schell: Yes.

Mr. Lincoln: Yes, sir.

The Court: 11. I would strike the first subparagraph there, beginning "Specifically." It seems unnecessary in view of the elimination of the express warranty feature. And add, after "ordinary care" in line 18, the phrase "under the circumstances"; and in line 19, following the word "and" in the last clause, add the words "to see to it" "that the animal is fit and suitable for the purpose for which the mule is hired." So the last subparagraph will read:

"That is to say, one who rents or lets or hires an animal such as a mule for riding purposes is held by law impliedly to warrant to the rider that [320-3] the"—

I think "owner" would be better than "renter."

"the owner of the animal knew or had exercised ordinary care under the circumstances to ascertain the habits of the mule, and to see to it that the animal is fit and suitable for the purpose for which the mule is hired."

It seems to me that unless some language is added into that last clause it might be susceptible of the interpretation that there are no qualifications upon the warranty——

Mr. Schell: I had a suggestion in that one instruction I had.

The Court: As so amended, does that meet your objection?

Mr. Schell: No. This is my objection to 11: While we assume that the law of Arizona is the same as California for the purpose of the case, in the absence of any law in the cases or anything like that, nevertheless, I do not think that the law of California, as such, will provide particular statutes or apply to a renting in Arizona. While the court has a right to assume, in the absence of contrary evidence, or suggestion, rather, that the law is the same, my understanding is that the courts do take judicial notice of the laws of considered states. It used to be that you had to put them in evidence, but now they take judicial notice of them but, [320-4] of course, we have to call them to their attention.

The Court: Of course, I construe Section 1955 as not to impose—I do not think Section 1955 does any more than raise the implied warranty of reasonable fitness.

Mr. Schell: I thought it might be a little confusing. Mr. Delamer checked the Arizona Code. There is no similar section to 1955 in Arizona, and there is no similar subdivision of the heading of that. And he said he checked through all the indices, all on the personal property and also the digests, and found no reference to any similar section in Arizona.

The Court: If you object to the reference to the section, it seems to me that the last subparagraph of the instruction would state the law. That is taken from the Stanley case—isn't that one of the cases that is cited—Cal. App.? I do not have it here with me.

Mr. Schell: There is another case in 52——

The Court: The case that cites the Dan case?

Mr. Schell: 52 Cal. App. (2d), Kersten vs. Young—isn't it, or Young vs. Kersten?

Mr. Lincoln: That Con case?

The Court: Yes. This last subparagraph is a virtual paraphrase of the language, except I used "suitable" instead of "safe." The decision there uses the word "safe." [320-5]

Mr. Schell: I just thought I would call the court's attention to this section. It might be confusing to some of the jurors. They will say this thing happened in Arizona, and to apply the California law, without any further explanation.

The Court: I do not think it adds anything so far as the jury is concerned.

Mr. Schell: And Mr. Delamer did say that he made diligent search and found no similar section whatsoever.



The Court: What would you think of introducing the last paragraph and merely make the instruction 11 read as follows:

“One who rents or lets or hires an animal such as a mule for riding purposes is held by law impliedly to warrant to the rider that the owner of the animal had exercised ordinary care under the circumstances to ascertain the habits of the mule, and to see to it that the animal is fit and suitable for the purpose for which the mule is hired.”

Mr. Schell: From the standpoint of construction, I am wondering whether the words “and to see to it” after the word “and,” starting in line 19, goes back and ties in with the “ordinary care.”

The Court: I added those words in an attempt to tie it into “ordinary care.” I am open to suggestions on that.

Mr. Lincoln: Would not the second section of that [320-6] instruction, your Honor, be satisfactory if you should strike out line 10, which reads “Section 1955 of the Civil Code of California,” and add in the place of it the words “the law”; so that it would read:

“The law imposes upon persons who hire or let,” etc.

I think that is the rule, at any rate, of the common law, whether it is the rule of statute law or not, and if there was no such statute in Arizona, as Mr. Schell says—I believe Mr. Delamer, of



course, when he says he does not find it, because I cannot find it myself. Then the common law naturally goes into effect.

As I understand it, the rule which your Honor has suggested in lines 11 to 14 of that proposed instruction is a statement of the common law.

The Court: Well, how would this satisfy both of you, then?

“The law imposes upon persons who hire or let or rent personal property, such as a mule, the legal duty to put such property into a condition fit for the purpose for which it is let or rented or hired.

“That is to say, one who rents or lets or hires an animal such as a mule for riding purposes is held [320-7] by law impliedly to warrant to the rider that the owner of the animal had exercised ordinary care under the circumstances to see to it that the animal is fit and suitable for the purpose for which the mule is hired.”

It seems to me this talk about “ascertaining the habits and propensities” are just all involved in fitness and suitability.

Mr. Schell: I think that clarifies it a good deal.

Mr. Lincoln: We are satisfied.

The Court: Shall I read it again? Are you satisfied with that, Mr. Schell?

Mr. Schell: I think so; yes, sir.

The Court: I will read it again if you like.

Mr. Schell: No; that is all right. We will just need it typed, because I have messed mine up so I will just have to rewrite it.

The Court: All right. 12, then, I have modified to read thusly:

“In this case, then, the defendant impliedly warranted to the plaintiff that the defendant had exercised ordinary care under the circumstances”—I added “under the circumstances”—“to see to it that the mule ‘Chiggers’ was fit and suitable to be ridden by the plaintiff down [320-8] Bright Angel Trail; and further, that throughout the trip the defendant’s agents in charge of the party would continue to exercise ordinary care under the circumstances to see to it that the mule ‘Chiggers’ was fit and suitable to be ridden by the plaintiff.”

Did I go too fast for you to get those changes?

Mr. Schell: Yes, sir; I am afraid so.

The Court: After “ordinary care” in line 10 I added “under the circumstances.” In line 11, after “ridden” I struck “on the trip taken” and inserted after “by the plaintiff” the words “down Bright Angel Trail”—“and further, that throughout the trip the defendant’s agents”—instead of “guiding” I inserted “in charge of.” Instead of “were exercising,” “would continue to exercise ordinary care,” adding after that “under the circumstances to see to it that the mule ‘Chiggers’ was fit and suitable to be ridden by the plaintiff.”

Mr. Schell: In other words, then, after the semicolon it reads: “and further, that throughout the trip the defendant’s agents in charge of the party would exercise ordinary care”?

The Court: No, "would continue to exercise."

Mr. Lincoln: "were exercising and would continue"?

The Court: No; not "were exercising." I have stricken [320-9] "were exercising" and have inserted "would continue to exercise."

The warranty is made at the time he buys the ticket, isn't it? That is when the warranty was made. And as far as what transpired up to that time, it is past. The conditions then existing at the present and in the future, isn't it? I mean the tense must be future. What do you say to that now?

Mr. Schell: I think that is all right.

Mr. Lincoln: We are satisfied, your Honor.

The Court: Then I have changed what was marked "15" so 13 would become 15, the definition of "ordinary care."

"Ordinary care is that care which persons of ordinary prudence exercise in the management of their own affairs in order to avoid injury to themselves or to others."

That is numbered in your set as 15.

Mr. Lincoln: Yes, sir.

The Court: I have renumbered that "13." It seems to me it belongs here.

Mr. Schell: What happens to 13?

The Court: That will take care of itself as we go along, I believe. What is 13 now in your set?

Mr. Schell: "The mere fact that an accident happened"——



The Court: Oh, that comes later, yes. So 15 in your [320-10] set, the definition of "ordinary care" becomes 13. I take it there is no objection to that?

Mr. Schell: No, sir.

Mr. Lincoln: No, sir.

The Court: And 16, starting out: "Ordinary care is not an absolute term, but a relative one." That becomes 14. Then old 13 becomes 15 now:

"The mere fact that an accident happened, considered alone, does not support an inference that some party, or any party, to this action failed to exercise ordinary care."

I notice you suggested one with respect to breach of warranty which is practically the same instruction, Mr. Schell.

Mr. Schell: Yes.

The Court: Do you think this covers it?

Mr. Schell: Let's see. I do not happen to have mine.

The Court: I have it here. Instead of "failure to exercise ordinary care" I think your proposal was:

"The mere fact that an accident happened considered alone does not give rise to an inference that the defendant breached any warranty."

That is your proposed instruction No. A-1.

"The mere fact that an accident happened considered alone does not give rise to an inference [320-11] that the defendant breached any warranty."



Mr. Schell: We have now——

The Court: The original one you proposed—well, it is a modification of the one you originally proposed where I inserted “ordinary care” instead of “negligence.” The one now is:

“The mere fact that an accident happened, considered alone, does not support an inference that some party, or any party, to this action failed to exercise ordinary care.”

Mr. Schell: I am wondering whether that might be confusing. I mean it boils down to the same thing so far as lawyers are concerned, but I am wondering if it might be confusing because we are submitting to them on the over-all basis of a breach of warranty, and we say what that warranty is. That is why we suggested this particular instruction.

The Court: I think the latter one, your proposed instruction A-1, is more applicable now than this.

Mr. Schell: I think it is, instead of the new 15.

The Court: Then the instruction to be given will be 15 and will read as follows:

“The mere fact that an accident happened, considered alone, does not support an inference that the defendant breached any warranty.”

What is 14 in your set will be renumbered 16 and reads: [320-12]

“The defendant was not an insurer of the safety of the plaintiff.”

Mr. Schell: Yes, sir.

The Court: Then what was numbered as instruction 19 in this set I gave you I have renumbered 17 and modified it to read as follows:

“In order to establish”——

I have stricken the words “a right of recovery based upon the implied warranty of the defendant in this case,” and inserted instead the words “the essential elements of his case.”

“In order to establish the essential elements of his case, the burden is upon the plaintiff to prove, by a preponderance of the evidence, all the following facts:”

In considering that proposed modification you might have in mind instruction 8, the first paragraph of which states:

“The burden is on the plaintiff in a civil action, such as this case now on trial, to prove every essential element of his case by preponderance of the evidence, and if the plaintiff fails to prove any essential element of his case by a preponderance of the evidence, then you must find for the defendant.”

I was attempting to tie that instruction into what had gone before in instruction 8. After “all the following [320-13] facts:

“First, that the mule ‘Chiggers’ was not fit and suitable for the purpose for which the defendant hired or let or rented him to the plaintiff; second, that prior to the accident”——

I have inserted "prior to the accident" the following:

"That"—"second, that prior to the accident, the defendant, through one or more of its agents, knew, or in the exercise or ordinary care"—

Mr. Lincoln: "of" may I change that? "of" it should be, your Honor.

The Court: Oh, yes; a typographical error.

Mr. Lincoln: Yes, sir.

The Court:

"of ordinary care under the circumstances should have known, that the mule ridden by the plaintiff was not fit and suitable for the purpose for which the defendant let him to the plaintiff; and third, that such breach of the implied warranty of the defendant as to the fitness and suitability of the mule was a proximate cause of any injuries and consequent damages sustained by the plaintiff."

Mr. Lincoln: We are satisfied.

Mr. Schell: We are satisfied.

The Court: Very well. What was 17 becomes 18. That [320-14] is:

"The proximate cause of an injury"—the definition of "proximate cause."

What was 18 becomes 19, which reads at the beginning:

"This does not mean that the law seeks and recognizes only one proximate cause of an injury,"—



Mr. Schell: I think that is one of the standard.

The Court: Yes; those are both from the California Standard Instructions.

Mr. Lincoln: Yes; we are satisfied.

The Court: BAJI. Then 20 is your No. 20 and I have not made any changes in that.

Mr. Schell: I think that is standard.

Mr. Lincoln: We have no objection.

The Court: You feel that is satisfactory?

Mr. Lincoln: Yes, sir.

The Court: Very well. What is 21 now will go out. That is the one in addition to the implied warranty I have just mentioned. "The plaintiff alleges," etc., dealing with express warranty. That will be eliminated.

Mr. Lincoln: That goes out entirely?

The Court: Yes.

Mr. Lincoln: Yes, sir.

The Court: And 22, which also deals with the essential elements of recovery for an express warranty, will go out [320-15] entirely.

Then the present 23 will become 21; 24 will become 22; 25, of course, will become 23; 26 will become 24; 27 will become 25; 28 will become 26; 29 will become 27; 30 will become 28; 31 will become 29; 32 will become 30; 33 will become 31; 34 will become 32.

If there is any objection to any of these that you gentlemen wish to call attention to now or any suggestions with respect to any of them as we go along, you may. They are mostly so-called stock instructions.

Mr. Lincoln: Yes, sir.



The Court: 35 will become 33; 36 will become 34; and the last one, 37, will become 35.

I have here re-written copies of what are now court's instructions 10, 11, 12, and 15, and I will ask the clerk to pass a copy of each one to you gentlemen.

Here is a re-draft, gentlemen, of court's instruction No. 17 that the clerk will pass you copies of.

Are you gentlemen satisfied, as far as you now know, with the instructions proposed to be given?

Mr. Schell: There is just one thing. I am now addressing myself not to the instructions that have been given but those that have been missed. Insofar as the ones that are given, I think those are satisfactory.

The Court: In other words, those that we have numbered [320-16] here 1 to 35, inclusive.

Mr. Schell: But we proposed instructions on two things: One, the assumption of risk, and contributory negligence; and particularly on the assumption of risk, which always is present in any enterprise, and we are always entitled to an instruction that anyone assumes the risk that is normally to be undertaken in an enterprise such as this. We start with our instructions No. 27 and 27.

The Court: Let me follow you here.

Mr. Schell: Our requested instructions, not the court's instructions.

The Court: Defendant's requested instructions.

Mr. Schell: 27 and 28 and 29 are the instructions on the assumption of risk. Our requested instructions are those numbers.

The Court: My view of that is that where contributory negligence is involved, if that is your defense, it seems to me it would be proper to instruct the jury, if the case was submitted on the question of negligence, alone, or if it were submitted on the issue of negligence along with the issue of breach of warranty. But these proffered instructions are both as to contributory negligence and assumption of risk.

Mr. Schell: Both are pleaded.

The Court: Yes; I recall. But I have been unable to [320-17] see assumption of risk would be a defense, any more than contributory negligence.

The jury is told that the breach of warranty must be the proximate cause of the injuries in order for plaintiff to recover. If the jury finds, for example, the only proximate cause of the accident were the plaintiff's negligence, notwithstanding the fact that contributory negligence is not a defense, they would find for the defendant, would they not?

Mr. Schell: I think that in a breach of warranty this type of contributory negligence is a defense, assuming that there was a breach of warranty.

The Court: It would not bar his recovery.

Mr. Schell: Oh, I think so.

The Court: You mean if he contributed in the slightest degree?

Mr. Schell: That is right; just like any other negligence case. That is my view of it, that contributory negligence is a bar to recovery.

(Discussion of court and counsel on legal points omitted from transcript.)

The Court: Isn't that implicit in our instructions here, instructions 15 and 16?

"The mere fact that an accident happened, considered alone, does not support an inference [320-18] that the defendant breached any warranty."

Isn't there implicit in that statement that the defendant is not liable for anything that would have happened anyhow? In other words, irrespective of the defendant's conduct?

In other words, the defendant is not liable for damages caused by dangers inherent in the enterprise.

And take 16:

"The defendant was not an insurer of the safety of the plaintiff."

Mr. Schell: Yes; I appreciate those concessions.

The Court: "The defendant is not an insurer of the safety of the plaintiff. The plaintiff"—

If you added another sentence there: "The plaintiff assumed the risks inherent in the enterprise," isn't that implicit?

Mr. Schell: Would it be implicit in the mind of the jury? That is what these are for.

Your Honor asked me a question. I am not certain. I am just wondering.

(Argument omitted from transcript.)

The Court: You see, the great danger here, the way these requested instructions, say, 27, is worded, the jury could very easily understand: Well, this is a risky venture, so he assumed all the risks in connection with it. [320-19]



Mr. Schell: Certainly 28, I think, clears that up.

The Court: 28 could clear it up if it were modified to read—that is, your requested instruction No. 28 could be modified to read: If the jury find that the plaintiff was injured not as the proximate result of any breach of warranty on the part of the defendant but by reason of the risk assumed, the risk inherent in the enterprise.

It seems to me you have to negative the very basis upon which the jury has already been told the only basis upon which the plaintiff could recover. The jury has been told now that in order to establish his case he must establish three things, three facts.

Mr. Schell: Well, I think possibly the modification might be proper under those circumstances.

The Court: That is instruction 17 and it follows the instruction 16, the court's instruction 16, which states the defendant is not an insurer of the plaintiff. In other words, starting with instruction 15 and reading those three, 15, 16 and 17 of the court's instructions, reading those together, isn't the jury told in effect that the defendant is not guaranteeing the safety of the plaintiff? The mere fact that he was thrown off of a mule, alone, does not mean he is entitled to recover; that in order for him to recover he has to establish by a preponderance of the evidence all of the three propositions of fact stated in instruction 17: [320-20] First, that the mule "Chiggers" was not fit and suitable for the purpose for which he was hired; second, that if prior to the accident defendant



knew or in the exercise of reasonable care should have known that fact; and third, that such breach was a proximate cause of the injury.

It seems to me that if plaintiff could establish those propositions, if they were convinced of those propositions, the plaintiff should recover.

Mr. Schell: Taking these two together, contributory negligence and the assumption of risk, while they are different, let us assume a hypothetical case. I am trying to clarify my mind.

The Court: Yes.

Mr. Schell: And that would be this: Assuming for the moment that the defendant did commit a breach of the warranty in the given case by not exercising due care in selecting a proper animal, assume that was established; in other words, some fellow, as your Honor said, walked up and said, "Here, I want to sell you a mule for \$10.00." "Is he gentle?" "Yes, he is gentle." "Here is your \$10.00." And they put him on the pack string. There undoubtedly would be a breach of warranty there, assuming the mule was not gentle.

Then we will say the plaintiff, in at least thinking he is a rider, gets himself a pair of spurs. He proceeds to wrack the mule with his spurs and the results achieved [320-21] are that he is dismounted suddenly, violently and severely.

Well, I would say that he could not recover, even though there was a breach of warranty, because contributory negligence in that instance would be a bar.

I use that as a very broad illustration to put across the point I have in mind. In other words, I think you can have contributory negligence as a bar, even though there is a so-called breach of warranty, because I think the breach of warranty is—I try to rationalize the statements that the courts use here, and I think they do it to get around the situation that through inaction go to the failure to make inquiry, rather than to some overt act or express knowledge. They are trying to express and say that the rule of due care in these cases is that you must find out and see whether that animal is safe; you must exercise reasonable care to that end.

The Court: What is your view on this question of contributory negligence?

Mr. Lincoln: Suppose we have a young fellow, fresh from the country, who has never seen a trolley car in his life, comes into the big city, never has seen a trolley car and never ridden on a trolley car, doesn't know what kind of an animal it is. He comes into the big city and he sees this big piece of machinery coming toward him. His friend, who is introducing him to the city for the first time, says, [320-22] "All right; it is perfectly safe. Go ahead." He goes ahead and the car hits him. Does he assume a risk? He doesn't know anything about it; he hasn't the slightest idea what the consequence might be by walking ahead; doesn't know but possibly there is some automatic device, if he knows about automatic devices.

The Court: You have to test it by the extreme case, hence presumably all the facts of life.

Mr. Lincoln: But our situation, your Honor, it seems to me is almost identical with the one which I have suggested.

The Court: It may be factually, but we are testing it by an extreme case. The question is: If someone had been throw off the mule on this trail the day before and this plaintiff knew about it and took the trip, the duty of the defendant toward him would be the same.

Mr. Lincoln: Under that circumstance, I think—

The Court: I do not think the defendant would be heard to come in here and say—well, it would be one of the circumstances, if it were a matter of common knowledge or these people were thrown off mules every day, that would be one of the circumstances.

Mr. Lincoln: No question then but he would assume a risk.

The Court: That would be brought home.

Mr. Lincoln: No question about it, sir. [320-23]

The Court: Then you are arguing a question of fact.

Mr. Lincoln: No. My suggestion is this, your Honor: If you have the defense of assumed risk, you must have the original proposition on which that is based factually that there is a risk.

The Court: Well, the plaintiff assumes a risk, otherwise the defendant is an insurer, is he not?

Mr. Schell: That is right.



Mr. Lincoln: Well, it does not seem to me, your Honor, I would go quite that far.

The Court: In other words, here is a certain risk. It does not make any difference whether it is X risk or 20X risk or a thousand X plus Y risk, whatever the quantity of the risk is, the parties acting on the scene altogether assume it, do they not? They assume 100 per cent of the risk as between the parties who went down this trail and the defendant on that day; or, to apply it specifically to our case, as between this plaintiff and the defendant, the two of them together assumed 100 per cent the risk of that undertaking, did they not?

Mr. Lincoln: Whatever it may have been.

The Court: Yes.

Mr. Lincoln: All right.

The Court: 100 per cent of it was assumed by the parties involved. [320-24]

Mr. Lincoln: Yes.

The Court: If the defendant had assumed 100 per cent of the risk, he would be an insurer, would he not? So the plaintiff assumed some of it. He assumed some of it. He assumed that which was inherent in the nature of the excursion and not occasioned by any want of ordinary care under the circumstances on the part of the defendant.

Mr. Lincoln: And also, I think, assuming that he knew that there was any risk involved.

The Court: Well, he would have to be pretty young not to know there was some risk involved.



Even if you are insured, you know there is some risk involved. The law may impose it all upon an insurer, but there is a risk. That is what the basis of the insurance is, isn't it?

Mr. Lincoln: Of course, I suppose that we might carry that to a logical conclusion. Maybe there is even a risk in walking down the sidewalk at any time.

The Court: Yes; there is a risk in every undertaking, and the question is how we can tell this to the jury without having them misunderstand what it is. I had the thought that it was covered or that it was implicit in instructions 15 and 16.

Mr. Lincoln: I think it is sufficiently.

The Court: What about contributory negligence?

Mr. Lincoln: Well, of course, as I still say, you can't [320-25] have the corollary unless you have the original proposition. You can't have contributory negligence unless you have negligence. You can't have something which makes a thing unless you have the thing itself, and here we do not claim negligence; so there can't be something which contributes to something which does not exist.

The Court: Mr. Lincoln, what do you say to the case put by Mr. Schell, where a rider did some unorthodox thing in connection with the handling of a mule? Suppose the evidence here showed that the plaintiff was pulling on the reins all the time.

Mr. Lincoln: Anybody who gets on a mule and sticks spurs into him ought to be thrown.

The Court: That is a layman's answer, but give me the lawyer's answer now.

Mr. Lincoln: I think that is a lawyer's answer, too.

The Court: All right. How would you tell the jury that in your instruction?

Mr. Lincoln: That would be something more than an assumed risk.

The Court: I am talking about contributory negligence now.

Mr. Lincoln: Oh, pardon me, sir.

The Court: Would that negligence bar the recovery of plaintiff for breach of warranty? [320-26]

Mr. Lincoln: I can't quite see where the two theories which we are endeavoring to present here are at all compatible. It seems to me, your Honor, if we have, as your Honor has now, these propositions of law based upon implied warranty, having separated out the difference between a warranty and a negligent act, as we endeavored to do—I do not quite see how we can have both at the same time.

If we have one, we can't have the other; if we have the negligence rule, then your implied warranty does not apply.

The Court: If a person uses any article negligently and that negligence is the proximate cause of the injury, does not that bar his recovery for a breach of implied warranty or express warranty?

Mr. Lincoln: Well, if he was using that, we will say, negligently and carelessly or something of that sort, and obviously the implied warranty

which was presented by the maker or the owner or whatever it may be was false, he would lose his case, even though, as I think your Honor very wisely suggested, even though the plea of any negligence or contributory negligence was not made.

The Court: With respect to the assumption of risk instruction 16 merely says that "The defendant was not an insurer of the safety of the plaintiff."

Would it meet the defendant's objection to add to that [320-27] court's instruction 16 the second sentence, which states:

"The plaintiff assumed all risks inherent in the trip which were not proximately caused by a breach of the defendant's implied warranty as to the fitness and suitability of the mule to be ridden by the plaintiff on the trip"?

Mr. Schell: May I have that once more, please?

The Court: "The plaintiff assumed all risks inherent in the trip which were proximately caused by a breach of the defendant's implied warranty as to the fitness and suitability of the mule to be ridden by the plaintiff on the trip."

Mr. Schell: "By a breach of the defendant's implied warranty"? I think that would certainly clarify it, your Honor.

Mr. Lincoln: If your Honor had in mind giving what that meant, in addition to the instruction, we would respectfully ask that your Honor add a little more to it, to the effect whether or not the plaintiff knew or could with reasonable care have known what risk he was encountering.



It would seem to me that there must be something there which would put the plaintiff on notice that there was not the ordinary risk inherent in any ordinary undertaking, but there was in this particular instance an unusual and extraordinary risk which he was expected to assume. And I [320-28] respectfully submit that, insofar as the evidence is concerned, there is not a shadow of anything to that effect.

The Court: Of course, the cases all say that what he knew or, in the exercise of reasonable care should have known, strictly speaking, that is what he in effect assumed. But in law, he assumed everything that the defendant did not assume, did he not?

I think that I will suggest this alternative statement, which seems to me would be clearer to the jury, who probably never heard of a warranty before in their lives.

“The plaintiff assumed all risks inherent in the trip which were not proximately caused by failure of defendant to exercise ordinary care under the circumstances.”

Mr. Lincoln: Might I have that again, if your Honor please?

The Court: “The plaintiff assumed all risks inherent in the trip which were not proximately caused by failure of the defendant to exercise ordinary care under the circumstances.”

Mr. Lincoln: May we put in there before the word “care” the word “continuing,” or before the word “ordinary” the word “continuing”?

Mr. Schell: That certainly would change the meaning.



Mr. Lincoln: I take it, your Honor, that the defendant [320-29] is not merely entitled to say, "Well, I used ordinary care up to the top of the rim."

The Court: Oh, no.

Mr. Lincoln: "Now, you go from here, and I don't use any more care at all. I don't take any care of what happens below there. That is your responsibility 99.44 per cent."

The Court: But the warranty, if you will look at instruction 12, states "that throughout the trip."

Mr. Lincoln: Well, then, the word "continuing"—yes, sir. The word "continuing" fits in with that very same thought. That, I think, is the law. He does not relieve himself of responsibility just as soon as Mr. Mateas, for example, starts on the trip, but his care continues all the way down, the same care, if your please, which he exercised up to that point.

I think, in one sense of the word, he should exercise greater care, but nevertheless, we will assume that ordinary care might be sufficient. That care would have to be constant.

The Court: See if this meets your objection: To add to instruction 16, the court's number, which now reads:

"The defendant was not an insurer of the safety of the plaintiff."

I think if you read 15 along with that—in other words, let us do what we tell the jury to do, to

consider [320-30] all the instructions together, and see if it meets the situation.

15 now reads:

“The mere fact that an accident happened, considered alone, does not support an inference that the defendant breached any warranty.”

The court's No. 16 now reads:

“The defendant was not an insurer of the safety of the plaintiff.”

Now, add to that this sentence:

“The plaintiff assumed all risks inherent in the trip which were not proximately caused by failure of the defendant either before or at the time of the accident to exercise ordinary care under the circumstances.”

Mr. Lincoln: May I have that language, if your Honor please, after the words “which were not proximately caused”?

The Court: “By a failure of the defendant either before or at the time of the accident to exercise ordinary care under the circumstances.”

Or, as an alternative:

“Plaintiff assumed all risks inherent in the trip which were not proximately caused by a breach of the defendant's implied warranty as above stated.”

I do not assume the defendant contends that the plaintiff [320-31] assumed any greater risk?

Mr. Schell: No. I think the leading case on assumption of risk, if your Honor please, is somebody versus LaFrance.

Mr. Lincoln: I would prefer, if that assumption of risk goes at all, the suggestion which your Honor has made.

The Court: We can modify it now to state that "he assumed all risks which he knew or reasonably should have known were inherent in the trip."

That would be, strictly speaking, greater, if you desire to amplify it to that extent, Mr. Lincoln.

Mr. Lincoln: "or reasonably should have known," sir?

The Court: "Plaintiff assumed all risks which he knew or reasonably should have known."

Mr. Lincoln: "to be inherent in the trip"?

The Court: "which he knew, or in the exercise of ordinary care should have known." Do you prefer to have that added qualification?

Mr. Lincoln: I think the word "reasonably" covers that, "reasonably should have known."

The Court: Well, capable of using ordinary care.

Mr. Lincoln: All right.

The Court: If you want to qualify it. The reason I did not qualify it in the first suggestion is because I take it the jury will assume that any person capable of reasoning would know there was some risk attached to riding [320-32] a mule down a mountain trail. There is no evidence here that there was any concealed risk such as there are in some cases where that qualifying language is usually used.

Would you prefer it to be used?



Mr. Lincoln: This is all right, sir, "in the exercise of ordinary care."

The Court: "The plaintiff assumed all risks which he knew, or in the exercise of ordinary care should have known, were inherent in the trip."

I think we will have to break that into two sentences now.

"However, the plaintiff did not assume any risk proximately caused by failure of the defendant, either before or at the time of the accident, to exercise ordinary care under the circumstances."

Mr. Schell: Mulling this over in my mind, this thought occurs to me: "ordinary care," I wonder whether that is a correct statement of law, that latter part, that latter exclusion, unless that latter qualification is also qualified.

Let us assume that the plaintiff realized part of the way down that the saddle was loose and called it to the attention of the guide, and the guide said, "I am sorry. There are no more holes in the saddle; we can't tighten it up," and let it go at that; and he felt the thing slip back and forth and slip back and forth and yet he continued to [320-33] ride; wouldn't he assume that risk, once he knew it existed? Wouldn't he assume that risk?

The Court: I do not think so.

Mr. Schell: There is that case where I think the person was barred from recovery. He was going with either a one-armed or one-eyed driver, and realized after a while that he could not see where



he was going, and eventually the car ran off the road because he either could not see and turned or could not make it because of the one arm, and recovery was denied on the ground that he assumed the risk.

In other words, I think you assume at the start the risk inherent in the enterprise, and then if a risk appears later that you did not know at the start, and you continue to go on—I know, for instance, if I were on that trail and I found that the saddle girth were broken and called it to the attention of the guide and he said, “Go ahead,” I would walk.

The Court: Yes. But I do not see how it can be said that he assumed that when the guide is in charge and told him in effect it would be safe for him to go ahead and ride. It is a question of who has superior knowledge, after all.

Mr. Lincoln: Of course, that is the point we have here. We have the statement, and perhaps some slight possible contradiction or interpretation of it, that the guide told the plaintiff to stay upon this particular mule which plaintiff had a reason at that time to believe was dangerous. That being so, we [320-34] respectfully submit that that was not an assumed risk.

The Court: Would this cover the situation, gentlemen, having in mind the court’s instructions 15 and 17: To amend instruction 16 to read as follows:

“The defendant was not an insurer of the safety of the plaintiff. The plaintiff assumed

all risks of the trip which were not proximately caused by failure of the defendant, either before or at the time of the accident, to exercise ordinary care under the circumstances.”

Shall I read it again?

Mr. Lincoln: If you will, please.

The Court:

“The plaintiff assumed all risks of the trip which were not proximately caused by failure of the defendant, either before or at the time of the accident, to exercise ordinary care under the circumstances.”

Mr. Lincoln: It seems to me, your Honor, that that covers almost too broad a latitude insofar as the plaintiff's responsibility is concerned.

The Court: Isn't that a correct statement of the law?

Mr. Lincoln: I think, sir, it is a correct statement insofar as it goes; but it seems to me that it should include [320-35] what your Honor, to my mind, so wisely included before, namely, he assumed all risks, in the exercise of ordinary care, which he knew or should have known, himself. To my mind that is something which the jury should be told insofar as plaintiff's knowledge, lack of knowledge, opportunity for knowledge, reason for knowledge, or reason for lack of knowledge is concerned before it drops down to the bald statement of what the defendant's excuses were. I think, under the circumstances of this particular case, the way in which your Honor had it originally is a much better statement of the law applicable to this situation.

The Court: Yes. I suppose that limits one of the circumstances which fixes the quantum of defendant's duty of care is what the plaintiff knew.

Mr. Lincoln: Or could have known.

The Court: I do not agree on the fact that the assumption of risk is necessarily limited or is not applicable to the acts of the defendant which the plaintiff should have known.

Mr. Schell: I do not agree on the fact that the assumption of risk is necessarily limited or is not applicable to the acts of the defendant which the plaintiff should have known.

The Court: The plaintiff is not charged with assuming a risk of anything that he did not know, or in the exercise of ordinary care should have known was a risk.

Mr. Schell: That I am not objecting to. But my idea [320-36] is that if he knew, even if the defendant was negligent and the plaintiff knew that. Supposing that the defendant were negligent, and when he walked up there to this mule it started bucking in the corral, nevertheless he climbed aboard and tried to ride it out; wouldn't he have assumed that risk? Even if he got pitched off up there in the corral and got up and dusted himself off and climbed on again?

The Court: It depends. If there were nothing more, it probably would. But if the guide said, "He is all right. He just does that because he is frisky, and does that when you first get on in the morning." That would be another thing, would it not?



Mr. Schell: What I am trying to say, I do not think we can limit it to the fact that it was not caused by their negligence, because I think in some instances it can be assumed, even then. We sometimes have to make violent illustrations.

The Court: The extreme case is always the test of the principle.

(Further discussion of court and counsel omitted from transcript.)

The Court: Your instruction 27 is based upon the assumption that if he knows of a risk he assumes it, even though it may be caused by a breach of warranty.

Mr. Schell: I think this is a standard instruction on the [320-37] assumption of risk, this 27 and 28.

The Court: I think the case you put, the question would be one of contributory negligence and not assumption of risk, because it presupposes negligence of the defendant.

Mr. Schell: Yes, it presupposes.

The Court: Or a breach of warranty by the defendant. As your requested instruction 29 states the distinction, contributory negligence must contribute to the injury, whereas the risks that the plaintiff here assumed were risks with respect to which he had no duty of care. He did not assume risks beyond that.

Mr. Schell: He did not until they became known to him.

The Court: Then it is a question of contributory negligence. It is not a question of whether he assumed the risk; it is a question of whether he, him-



self, was negligent and his negligence contributed to the injury, it seems to me.

Mr. Schell: Well, possibly that is the distinction. But I think, once he knew that the risk was inherent or was there, and he continued to act, that is a question of fact whether or not he either assumed the risk or was guilty of contributory negligence.

The Court: In view of our last remarks would this meet the situation for court's No. 16:

“The defendant was not an insurer of the safety of [320-28] plaintiff. The plaintiff assumed all risks which he knew, or in the exercise of ordinary care should have known, were inherent in the trip; but the plaintiff did not assume any risks which were proximately caused by the failure of the defendant, either before or at the time of the accident, to exercise ordinary care under the circumstances.”

It seems to me that to use the words “inherent in the enterprise by itself” means that it is not caused by any negligence.

Mr. Schell: I think, if it is inherent in the enterprise, that really does assume that. Of course, I think that the things that are inherent to the enterprise or inherent in the particular enterprise would become known a little later on.

The Court: I do not believe it includes negligent acts, risks caused by negligence.

Mr. Schell: If you say “contributory negligence” and mean something brand new, but where they have knowledge of the negligent condition such

as, we will say, a defective saddle or no reins on the bridle or something like that, it might be something else again, because that would be inherent in that particular trip. In other words, I think, an overt act just happening suddenly, he would not assume [320-39] that.

The Court: That is where the assumption of risk would blend into your contributory negligence.

Mr. Schell: Yes. There is a very fine line of demarcation where one starts and the other stops.

It is quite difficult.

The Court: If the risk, caused by certain negligence of the defendant, had proceeded for such a long time it was part of the inherent nature of the undertaking.

Mr. Schell: In other words, the case where people ride with somebody else, having no control, and they continue to ride at night without any headlights, they have assumed the risk, even though that is caused by the negligence of the driver continuing to drive without headlights. On the other hand, if he suddenly switched the headlights off while they were driving, that is something else.

The Court: Yes. I suppose it can proceed long enough to cross the border line and be a part of the inherent nature.

Mr. Schell: Become a part of the inherent nature of the trip. I mean if the jury should believe his story that this mule forged ahead all the time during the trip, etc., then it might have become an inherent part of the enterprise by that time, four hours of it.

The Court: I do not think there is any evidence here [320-40] that any negligent acts of these defendants had continued for such a time as to become an inherent part of the enterprise; and the defendant has contended throughout that it has done everything humanly possible.

Mr. Schell: What I had in mind was the one witness, the one lady, who testified rather more than anybody else that from the moment this trip started it was a ruckus, you might say, going on in the back between Chiggers and Mr. Mateas; and if by any chance the jury should believe that, that became almost inherent in the enterprise by that time.

The Court: Mr. Lincoln, do you have any comments to make on this latest suggestion?

Mr. Lincoln: No, sir. I am satisfied with it, as I say, if we must assume risk at all.

The Court: Then I will have 16 rewritten to add this second sentence here that I have just read.

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Mr. Schell: Shall we let your jury go? They probably have something they would like to do.

The Court: Yes, in just a moment.

Will you bring the jury in, Mr. Bailiff? You think we will be ready, gentlemen, by 1:30?

Mr. Schell: Will your Honor instruct them then today and send them out?

The Court: Just a moment, Mr. Bailiff. If we start at 1:30 it will be 2:40 before we finish the argument, will [320-41] the other one I think your Honor has suggested, if we proceed upon implied warranty, then obviously we do not proceed upon



negligence. And it seems to me, as I say, that negligence is not raised and you cannot contribute to that which is not an issue.

The Court: Have you any cases on that question?

Mr. Schell: I haven't now. I might be able to dig some up very shortly.

The Court: Let us come back and discuss that at 1:30.

Mr. Lincoln: All right.

The Court: See if you can find anything on it.

Mr. Schell: I will endeavor to, yes, your Honor.

Just to leave a parting thought, in view of the way these cases are treated, in other words, it is the same thing by a different name; it must be negligence in order to constitute a breach, and that has been my primary thought. If you want to call it negligence or breach of warranty, it is still the same animal and you are not talking about "Chiggers."

The Court: Your view, I take it, is that the only function of law which raises the implied warranty is to impose the duty of care?

Mr. Schell: That is right.

The Court: Which otherwise would not arise out of the relationship? [320-47]

Mr. Schell: That is right. In other words, it is an implied agreement of exercising care and it defines what that care is. It must be both negative and positive, so to speak. In other words, it is not an overt act alone, but they must make inquiry. It sets the standard of care.



The Court: Did the clerk hand you gentlemen forms of proposed verdict?

Mr. Schell: Yes. They are satisfactory. [320-48]

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The Court: Do you wish an instruction given on inevitable and unavoidable accident, Mr. Schell?

Mr. Schell: I would prefer it; yes, your Honor.

I would say I found two cases during the noon hour, both cases being somewhat old friends of ours that we have talked about heretofore, on the point of contributory negligence and assumption of risk.

The Court: Yes. First, as long as I opened the question of inevitable and unavoidable accident, I drafted a modification of your requested instruction. Mr. Clerk, will you hand the copies to counsel? I have numbered it 14-A. It seems to me that would be an appropriate place for it to be inserted.

Mr. Schell: It is entirely satisfactory.

The Court: Now will you cite me the authorities? [320-49]

(Further discussion of counsel and the court on legal questions omitted from transcript.)

The Court: It seems to me that contributory negligence has no place in the action, and I had so assumed, Mr. Schell. I did not find it pleaded in the answer to the second amended complaint.

Mr. Schell: You say it is not pleaded?

The Court: Inevitable and unavoidable accident is pleaded and assumption of risk.

Mr. Schell: Your Honor is right there. I was under the assumption that it had been pleaded. No; it is not pleaded, your Honor. I have been laboring under the assumption that it had been.

The Court: Do you gentlemen have any further suggestions or comments with respect to the intended instructions now?

Mr. Schell: Not any more.

The Court: Have you, Mr. Lincoln?

Mr. Lincoln: I have none; no, sir.

The Court: Are you ready to proceed with the argument?

Mr. Schell: Ready as far as we are concerned.

The Court: Are you ready?

Mr. Lincoln: Yes, sir; we are ready.

Mr. Schell: We are ready. [320-50]

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## COURT'S CHARGE TO THE JURY

Ladies and Gentlemen of the Jury:

It is now my duty to instruct you as to the law governing this case. It is your duty, as jurors, to follow the law as stated in the instructions of the Court and to apply the law so given to the facts as you find them from the evidence before you.

The jury must accept the instructions of the Court as comprising together a complete and correct statement of the law governing the case. Do not single out one instruction alone as stating the law, but consider the instructions as a whole.

Regardless of any opinion you may have as to what the law ought to be, it would be a violation of your sworn duty to base a verdict upon any other view of the law than that given in the instructions of the Court.

The law of the United States permits the judge to comment to the jury on the evidence in the case. Such [325] comments are only expressions of the judge's opinion as to the facts; and the jury may disregard them entirely, since the jurors are the sole judges of the facts.

It is not my custom to include comments on the evidence in my instructions to the jury; nor shall I do so in this case, because I am satisfied you are fully capable of determining the facts without my aid.

You are here for the purpose of trying issues of fact presented by the allegations of the second amended complaint of the plaintiff, Elmer H. Mateas, and the answer thereto of the defendant, Fred Harvey, a corporation. You are to perform this duty without bias or prejudice as to either party. The law does not permit jurors to be governed by sympathy, prejudice, or public opinion. The parties and the public expect that you will carefully and dispassionately consider all the evidence, follow the law as stated by the Court, and reach a verdict just to each side, regardless of what the consequences may be.

You, as jurors, are the sole judges of the credibility of the witnesses and the weight to which their testimony is entitled. A witness is presumed to speak the truth. However, this presumption may be outweighed by the manner in which the witness testifies, by the character of the testimony given, or by contradictory evidence. You should [326] carefully scrutinize the testimony given, and all the circum-



stances under which each witness has testified. Consider each witness's intelligence, demeanor and manner while on the stand, and the relation which he or she may bear to each side of the case. Consider also the manner in which each witness might be affected by the verdict, the extent to which, if at all, he or she is either supported or contradicted by other evidence, and every other matter in evidence which tends to indicate whether the witness is worthy of belief.

If you find that the presumption of truthfulness has been outweighed as to any witness, you will give the testimony of that witness such credibility, if any, as may be directed by your judgment as reasonable men and women.

A witness may be impeached and discredited by contradictory evidence; or by evidence that at other times the witness has made statements which are inconsistent with the witness's present testimony.

If you believe any witness has been impeached, you will give the testimony of that witness such credibility as you may think it entitled to, if any.

If a witness is shown knowingly to have testified falsely concerning any material matter, you have a right to distrust such witness's testimony in other particulars. And you may reject all the testimony of that witness which [327] is not corroborated or supported by other credible evidence.

You are not bound to decide any issue of fact in accordance with the testimony of a number of witnesses which does not produce conviction in your minds, as against the testimony of a lesser number



of witnesses or other evidence which does produce conviction in your minds. The test is not which side brings the greater number of witnesses, or presents the greater quantity of evidence, but which witness and which evidence appeals to your minds as being most accurate and otherwise trustworthy.

The testimony of a single witness, which produces conviction in your minds, is sufficient for the proof of any fact, and would justify a verdict in accordance with such testimony even though a number of witnesses may have testified to the contrary if, after weighing all the evidence in the case, the jury believes that the balance of probability points to the accuracy and honesty of the one witness.

The burden is on the plaintiff in a civil action, such as this case now on trial, to prove every essential element of his case by a preponderance of the evidence, and if the plaintiff fails to prove any essential element of his case by a preponderance of the evidence, then you must find for the defendant.

The term "preponderance of the evidence" means the greater weight of the evidence. In other words, such evidence as, when weighed with that opposed to it, has more convincing force and produces in your minds conviction of the greater probability of truth.

While it is incumbent upon the party who asserts the affirmative of an issue, thus having the burden of proof, to prove his allegations by a preponderance of the evidence, the law does not require demonstration, or such degree of proof as produces absolute certainty; because such proof is rarely possible.

In a civil action such as this, it is proper to find that a party has succeeded in carrying the burden of proof on an issue of fact, if the evidence favoring such party's side of the question is more convincing than that tending to support the contrary side, and causes the jury to believe that the probability of truth on such issue favors that party.

The plaintiff in this case claims damages for personal injuries alleged to have been suffered by him as a proximate result of claimed breach of the implied warranty made by the defendant in connection with the hiring or letting or renting to the plaintiff of a mule named "Chiggers" for a trip on June 17, 1942, down Bright Angel Trail into the Grand Canyon of Arizona.

The law imposes upon persons who hire or let or rent personal property, such as a mule, the legal duty to [329] put such property into a condition fit for the purpose for which it is let or rented or hired.

That is to say, one who rents or lets or hires an animal such as a mule for riding purposes is held by law impliedly to warrant to the rider that the owner of the animal had exercised ordinary care under the circumstances to see to it that the animal is fit and suitable for the purpose for which the mule is hired.

In this case, then, the defendant impliedly warranted to the plaintiff that the defendant had exercised ordinary care under the circumstances to see to it that the mule "Chiggers" was fit and suitable to be ridden by the plaintiff down Bright Angel

Trail; and further, that throughout the trip the defendant's agents in charge of the party would continue to exercise ordinary care under the circumstances to see to it that the mule "Chiggers" was fit and suitable to be ridden by the plaintiff.

Ordinary care is that care which persons of ordinary prudence exercise in the management of their own affairs in order to avoid injury to themselves or to others.

Ordinary care is not an absolute term, but a relative one. By this we mean that in deciding whether ordinary care was exercised in a given case, the conduct in question must be considered in the light of all the surrounding circumstances, as shown by the evidence. [330]

The mere fact that an accident happened, considered alone, does not support an inference that the defendant breached any warranty.

The defendant was not an insurer of the safety of the plaintiff. The plaintiff assumed all risks which he knew, or in the exercise of ordinary care should have known, were inherent in the trip; but the plaintiff did not assume any risk which was proximately caused by failure of the defendant, either before or at the time of the accident, to exercise ordinary care under the circumstances.

The defendant alleges that the accident involved in this case was inevitable and unavoidable in so far as the defendant is concerned. The law recognizes what is termed an unavoidable or inevitable accident. These terms do not mean literally that it was impossible for such an accident to be avoided, but



simply that the accident was not proximately caused by the failure to exercise ordinary care under the circumstances.

If you find that the defendant did at all times exercise ordinary care under the circumstances to furnish the plaintiff with a mule which was fit and suitable for the purpose of carrying the plaintiff on the trip involved in this case, then your verdict should be for the defendant.

In order to establish the essential elements of his case, the burden is upon the plaintiff to prove, by a [331] preponderance of the evidence, all the following facts: First, that the mule "Chiggers" was not fit and suitable for the purpose for which the defendant hired or let or rented him to the plaintiff; second, that prior to the accident the defendant, through one or more of its agents, knew, or in the exercise of ordinary care under the circumstances should have known, that the mule ridden by the plaintiff was not fit and suitable for the purpose for which the defendant let him to the plaintiff; and third, that such breach of the implied warranty of the defendant as to the fitness and suitability of the mule was a proximate cause of any injuries and consequent damages sustained by the plaintiff.

The proximate cause of an injury is that cause which, in natural and continuous sequence, unbroken by any efficient intervening cause, produces the injury, and without which the result would not have occurred. It is the efficient cause—the one that necessarily sets in operation the factors that accomplish the injury.



This does not mean that the law seeks and recognizes only one proximate cause of an injury, consisting of only one factor, one act, one element of circumstance, or the conduct of only one person. To the contrary, the acts and omissions of two or more persons may work concurrently as the efficient cause of an injury, and in such a case, each of the participating acts or omissions is regarded in [332] law as a proximate cause.

The defendant in this case is a corporation and as such can act only through its officers and employees, who are its agents. The acts and omissions of an agent, done within the scope of his authority, are, in contemplation of law, the acts and omissions respectively of the corporation whose agent he is. It has been established that the mule involved in the accident was the property of the defendant and that it was in charge of agents of the defendant acting within the scope of their authority. Thus, the conduct of those agents shall be deemed by you to have been the conduct of the defendant corporation. Likewise, a corporation can gain knowledge only through its agents. So the knowledge of the defendant's agents as shown by a preponderance of the evidence shall be deemed by you to have been the knowledge of the defendant corporation.

In your consideration of the evidence you are not limited to the bald statements of the witnesses. On the contrary, you are authorized to draw, from facts which you find have been proved, such inferences as seem justified in the light of your experience as reasonable men and women.

You should distinguish carefully between what has been testified to by the witnesses and what has been stated by the attorneys. Statements and arguments of counsel are not evidence in the case. [333]

However, when the attorneys have stipulated or agreed to certain facts, you are to regard such facts as conclusively proved.

You must consider only the evidence before you. That evidence consists of the sworn testimony of the witnesses, the exhibits which have been received in evidence, and all facts which have been stipulated or agreed to by counsel.

Any evidence as to which an objection was sustained by the court, and any evidence which was ordered stricken by the court, must be entirely disregarded.

During the course of the trial, I have asked questions of certain witnesses. My object was to bring out in greater detail facts not then fully covered in the testimony. You are not to assume that I hold any opinion as to the matters to which the questions related. Remember at all times that you, as jurors, are at liberty to disregard all comments of the court in arriving at your own findings as to the facts.

The plaintiff alleges that by reason of injury to his spine and hip, proximately resulting from the accident involved in this case, he has sustained general damages in the sum of \$10,000 and has lost an additional sum of \$1,785 by reason of his absence from work. These allegations are not evidence of course, but merely the extent of [334] the plaintiff's claims and must not be considered by you as evidence.

Neither the allegations of the complain as to the amount of damage plaintiff claims to have suffered, nor the prayer asking for certain compensation, is to be considered by you in arriving at your verdict, except in this one respect, that the amount of damage alleged in the complaint does fix a maximum limit, and you are not permitted to award plaintiff more than that amount.

If, under the court's instructions, you should find that the plaintiff is entitled to a verdict, in arriving at the amount of the award you shall determine the reasonable value of the time lost, if any, by the plaintiff since his injury, wherein he has been unable to pursue his occupation. In determining this amount, you should consider evidence of plaintiff's earning capacity, his earnings, and the manner in which he ordinarily occupied his time before the injury, and find what he was reasonably certain to have earned in the time lost had he not been disabled.

If, under the court's instructions, you should find that the plaintiff is entitled to a verdict, you will award him such sum as will compensate him reasonably for any pain, discomfort and anxiety suffered by him and proximately resulting from the injury in question, and for such pain, discomfort and anxiety, if any, as he is reasonably certain to suffer in the future from the same cause. [335]

Such sum also as will compensate the plaintiff reasonably for any loss of earning power occasioned him by the damage in question, and from which he is reasonably certain to suffer in the future. In



fixing this amount you may consider what plaintiff's health, physical ability and earning power were before the accident and what they are now, the nature and extent of his injuries, whether or not they are reasonably certain to be permanent, or if not permanent, the extent of their duration, all to the end of determining the effect of his injuries upon his future earning capacity and the present value of the loss so suffered.

Damages must be reasonable. In the event that your verdict is for the plaintiff, you may award him only such damages as will fairly and reasonably compensate him for the injuries or damages which you believe from a preponderance of the evidence he has sustained as a proximate result of the accident.

The fact that I have instructed you as to the measure of damages in this case should not be considered as intimating any view of mine as to which party is entitled to your verdict. Instructions as to the measure of damages are intended for your guidance in the event you find from the evidence in favor of the plaintiff.

The verdict must represent the considered judgment [336] of each juror. In order to return a verdict, it is necessary that each juror agree thereto. Your verdict must be unanimous.

It is your duty as jurors to consult with one another and to deliberate with a view to reaching an agreement, if you can do so without violence to individual judgment. Each of you must decide the case for yourself, but do so only after a considera-



tion of the evidence with your fellow jurors. In the course of your deliberations, do not hesitate to change an opinion when convinced that it is erroneous. But do not surrender your honest conviction as to the effect or weight of evidence solely because of the opinion of the other jurors, or for the mere purpose of returning a verdict.

Discrepancies in a witness's testimony or between his testimony and that of others, if there were any, do not necessarily mean that the witness should be discredited. Failure of recollection is a common experience, and innocent misrecollection is not uncommon. It is a fact, also, that two persons witnessing an incident or a transaction often will see or hear it differently. Whether a discrepancy pertains to a fact of importance or only to a trivial detail should be considered in weighing its significance. But a wilful falsehood always is a matter of importance and should be seriously considered. [337]

The attitude of jurors at the outset of their deliberations is important. It is rarely productive of good for a juror, upon entering the jury room, to make an emphatic expression of opinion on the case or to announce a determination to stand for a certain verdict. When a juror does that at the outset individual pride may become involved, and he or she may hesitate to recede from an announced position even when later shown that it is incorrect. You are not partisans. You are judges—judges of the facts. Your sole interest is to ascertain the truth. You will make a definite contribution to the administration of justice if you arrive at an impartial verdict in this case.

If it becomes necessary during your deliberations to communicate with the Court, do not indicate in any manner how the jury stands, numerically or otherwise, until you have reached a unanimous verdict.

\* \* \* \* \*

The Court: Is it stipulated, gentlemen, that the jury has left the room? [338]

Mr. Lincoln: Yes, sir.

Mr. Schell: So stipulated.

The Court: Has the plaintiff any exceptions to note on the record to the instructions thus far given?

Mr. Lincoln: No, sir.

The Court: I have given all the instructions, with the exception of instruction 35 dealing with the selection of the foreman.

Has the defendant any exceptions to note on the record with respect to the instructions thus far given?

Mr. Schell: No, your Honor, except the instruction on the — I don't remember whether it is necessary to note an exception on the instructions nowadays—but the instruction on the assumption of risk, as I pointed out before, I feel it was broader—in other words, he assumed any risk, even though that risk might have been caused by the defendant, provided that plaintiff knew.

The Court: That refers back to our discussion the other day?

Mr. Schell: That refers back to our discussion.

The Court: That an act or omission of the de-

fendant might have gone on for a sufficient period of time back to prove the inherent risk of the enterprise?

Mr. Schell: That is correct.

The Court: And have been known, of course, to the plaintiff, or, in the exercise of due care, he should have [339] known. That is your contention?

Mr. Schell: That is my contention, yes.

The Court: Rule 51 states that “\* \* \* No party may assign as error the giving or failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. \* \* \*”

Of course, the purpose of that is to enable the trial judge to modify the instructions or give additional instructions to correct the error.

I have in mind your contention on that. I think that that is the law, but I do not see any applicability of it to this case.

Mr. Schell: I want to preserve my point here.

The Court: And I think it is possible for an act or an omission by a party to go on for such a period of time that it becomes part of the scene itself. But it seems to me, in a case such as this, it would have to be almost notorious if the Harvey Company did something or failed to do something that bore upon the safety of the trip or the fitness or suitability of the mule.

Are there any others?

Mr. Schell: No, your Honor. [340]

\* \* \* \* \*



The Court: Ladies and gentlemen, I will now give you the concluding instruction.

Upon retiring to the jury room, you will select one of your number to act as foreman. The foreman will preside over your deliberations and will be your spokesman to the court.

Forms of verdict have been prepared for your convenience and I exhibit them to you. There are two forms. One is entitled in the court and cause, and reads:

“We, the jury in the above entitled cause, find in favor of the plaintiff, Elmer H. Mateas, and against the defendant, Fred Harvey, a corporation, and assess the plaintiff’s damages in the sum of” blank dollars.

“Los Angeles, California.

“October” blank, “1947.”

Blank line for signature over the words “Foreman of the Jury.”

In the event your verdict is for the plaintiff, you will have your foreman insert the amount of the damages which you assess in favor of the plaintiff and fill in the date and sign that verdict and return with it to the courtroom.

The other form is entitled, likewise, in the court and cause, and reads:

“We, the jury in the above entitled cause, find in favor of the defendant, Fred Harvey, a



corporation, and against the plaintiff, Elmer H. Mateas.

“Los Angeles, California.

“October” blank, “1947.”

A line for signature over the words “Foreman of the Jury.”

In the event your verdict is for the defendant, you will have the foreman complete the date, sign that verdict and return with it to the courtroom when you have reached a unanimous agreement.

The exhibits in the case will be available to you if you request them. [343]

\* \* \* \* \*

“We, the jury in the above entitled cause, find in favor of the plaintiff, Elmer H. Mateas, and against the defendant, Fred Harvey, a corporation, and assess the plaintiff’s damages in the sum of \$7,500.00.

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[Endorsed]: No. 11858. United States Circuit Court of Appeals for the Ninth Circuit. Fred Harvey, a corporation, Appellant, vs. Elmer H. Mateas, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Southern District of California, Central Division.

Filed February 16, 1948.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals  
for the Ninth Circuit.

United States Circuit Court of Appeals  
for the Ninth Circuit

No. 11858

FRED HARVEY, a corporation,

Appellant,

vs.

ELMER H. MATEAS,

Appellee.

STATEMENT OF POINTS ON APPEAL

I.

That the trial court committed error in admitting in evidence the testimony of conversations between the plaintiff and a Mr. Boles, which conversations did not take place in the presence of or within the hearing of the defendant or any of its agents, servants or employees.

II.

That the trial court committed error in admitting in evidence the testimony of the witness Ella W. Vogel as to conversations which she heard between the plaintiff and a Mr. Boles, which hearing did not take place in the presence of or within the hearing of the defendant or any of its agents, servants or employees, and which testimony appears in the Reporter's transcript on pages 141 to 148 inclusive.

## III.

That the court committed error in the giving to the jury of the following instructions:

“The defendant was not an insurer of the safety of the plaintiff. The plaintiff assumed all risks which he knew, or in the exercise of ordinary care should have known, were inherent in the trip; but the plaintiff did not assume any risk which was proximately caused by failure of the defendant, either before or at the time of the accident, to exercise ordinary care under the circumstances.”

Dated: February 12, 1948.

WALTER O. SCHELL,  
GERALD F. H. DELAMER,  
SCHELL & DELAMER,

By /s/ GERALD F. H. DELAMER,  
Attorneys for Appellant, Fred  
Harvey, a corporation.

[Affidavit of service by mail attached.]

[Endorsed]: Filed Feb. 16, 1948.

[Title of Circuit Court of Appeals and Cause.]

DESIGNATION OF PART OF  
RECORD TO BE PRINTED

To the Clerk of the United States Circuit Court of  
Appeals for the Ninth Circuit:

Appellant hereby designates for the printed  
record the following parts of the certified transcript  
of record on appeal in the above entitled matter:

1. The complaint;
2. Petition for removal to federal court;
3. Order for removal to federal court;
4. Second amended complaint;
5. Answer to amended complained filed on the  
6th day of September, 1945;
6. Stipulation for pre-trial;
7. Order on pre-trial hearing;
8. Defendant's objections to instructions and  
interrogatories proposed by plaintiff;
9. Instructions to jury requested by defendant;
10. Verdict;
11. Judgment;
12. Motion for new trial;
13. Notice of said motion (eliminating memoran-  
dum of points and authorities in support of  
said motion);
14. Order denying motion for new trial;
15. Notice of appeal;



16. Designation of record on appeal filed in the United States District Court;
17. Statement of points upon which appellant intends to rely on the appeal in this case, filed in the United States District Court;
18. Designated portions of the reporter's transcript of proceedings;
19. Order for transfer of original exhibits;
20. Certificate of Clerk of United States District Court;
21. Statement of points on appeal, filed in Circuit Court of Appeals;
22. Designation of part of record to be printed, filed in Circuit Court of Appeals.

Dated this 12th day of February, 1948.

WALTER O. SCHELL,  
GERALD F. H. DELAMER,  
By /s/ GERALD F. H. DELAMER,  
Attorneys for Appellant Fred  
Harvey, a corporation.

[Affidavit of service by mail attached.]

[Endorsed]: Filed Feb. 16, 1948.

[Title of Circuit Court of Appeals and Cause.]

DESIGNATION OF PART OF RECORD  
REQUESTED BY APPELLEE TO BE  
PRINTED

To the Clerk of the United States Circuit Court of  
Appeals for the Ninth Circuit:

Appellee hereby designated for the printed record  
the additional portion of the certified transcript of  
record on appeal in the above entitled matter,  
namely:

The designated portions of the reporter's tran-  
script of the proceedings.

WALTER GOULD LINCOLN,  
Attorney for Appellee.

[Affidavit of service by mail attached.]

[Endorsed]: Filed Feb. 28, 1948.

